

1992

# Toward a Partial Economic, Game-Theoretic Analysis of Hearsay

Richard D. Friedman

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>



Part of the [Law Commons](#)

---

## Recommended Citation

Friedman, Richard D., "Toward a Partial Economic, Game-Theoretic Analysis of Hearsay" (1992). *Minnesota Law Review*. 2174.  
<https://scholarship.law.umn.edu/mlr/2174>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact [lenzx009@umn.edu](mailto:lenzx009@umn.edu).

# Toward a Partial Economic, Game-Theoretic Analysis of Hearsay

Richard D. Friedman\*

[W]hen they come to model Heaven,  
And calculate the stars, how they will wield  
The mighty frame, how build, unbuild, contrive  
To save appearances; how gird the Sphere  
With Centric and Eccentric scribbl'd o'er,  
Cycle and Epicycle, Orb in Orb.<sup>1</sup>

## I. INTRODUCTION AND LIMITATIONS

Hypothetical 1: *Propco is at trial against Oppco. Through an authenticating witness, Propco offers into evidence a memorandum evidently written by one of its employees, who is not identified on the face of the memo. The memo recounts a conversation that the author of the memo says that she had with an officer of Oppco. Propco offers the memo to prove that the conversation occurred as recounted in the memo. The memo has substantial probative value for that purpose, and there is no reason to exclude it—except for the rule against hearsay. Oppco objects to the memo as hearsay.*

Thus, a typical hearsay issue is presented to the court. The memo is a statement made other than by a witness testifying at the trial, and the proponent, Propco, is offering the memo to prove the truth of a matter asserted in it. Thus, the opponent, Oppco, is correct that, as offered for this purpose, the memo is hearsay. Under the traditional doctrine, which still prevails in American jurisdictions, the statement will be excluded unless the court finds that the statement fits within an exemption from the rule against hearsay.<sup>2</sup> For example, Federal Rule of Evidence 801(d) lists between two and eight exclusions (de-

---

\* Professor of Law, University of Michigan Law School. I am grateful for the many helpful leads, comments, suggestions, and criticisms I have received during the preparation of this Article, especially from Ron Allen, Robert Axelrod, Guido Calabresi, Mirjan Damaška, Joanna Friedman, Stephen Gardbaum, David Goodhand, Jerry Israel, Avery Katz, Lash LaRue, Roger Park, Michael Seigel and Eleanor Swift. Thanks also to John Lloyd for preparation of the diagrams and to Vivian James for her extraordinary efforts.

1. JOHN MILTON, *PARADISE LOST*, Book VIII, lines 79-84 (Merritt Y. Hughes ed., 1962).

2. I use the term exemption here in an all-inclusive manner, to cover

pending on how they are counted) from the definition of hearsay, and Rules 803 and 804 state twenty-seven categorical exceptions, plus two virtually identical broad-based residual exceptions.<sup>3</sup> The categorical exceptions are based principally on the perceived trustworthiness of statements fitting within them. The exceptions fill a role similar to that performed by the "Cycle and Epicycle, Orb in Orb" of the Ptolemaic system of astronomy scathingly described by Milton,<sup>4</sup> and they create a similar degree of complexity and contrivance.

In this Article, I offer a fundamentally different and non-doctrinaire way of approaching hearsay questions. In brief, I take the view that the resolution of a hearsay dispute, when the declarant is not on the stand, is essentially a matter of deciding who should bear the burden of producing the declarant, or more precisely, how courts should allocate that burden. Adopting a simple procedural improvement, concerning the examination of the declarant if she is produced as a witness, allows the court to allocate the burden optimally. If live testimony by the declarant would be more probative than prejudicial, then most often—contrary to standard doctrine—the hearsay also is more probative than prejudicial. When this is so, the court ordinarily ought to impose the burden of producing the declarant on the opponent, the party objecting to the hearsay. Sometimes, though, other considerations—such as whether the proponent has a substantial advantage in satisfying all or part of the burden of producing the declarant, or whether the proponent has given late notice of his intention to offer the hearsay—may warrant imposing part or all of the burden on the proponent.

For two reasons, I will not engage here in an extended discussion of reasons that hearsay doctrine should be fundamentally reformed. First, others have made the case before.<sup>5</sup> Obviously, commentators have not reached anything resembling a consensus that the law should be overhauled;<sup>6</sup> if they had, the change likely would have been accomplished by now.

---

both exclusions from the definition of hearsay and exceptions from the rule presumptively excluding hearsay from evidence.

3. See FED. R. EVID. 801, 803, 804.

4. See *supra* note 1 and accompanying text.

5. E.g., Eleanor Swift, *A Foundation Fact Approach to Hearsay*, 75 CAL. L. REV. 1339, 1343-54 (1987); Jack B. Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331, 340 (1961); Note, *The Theoretical Foundation of the Hearsay Rules*, 93 HARV. L. REV. 1786, 1793 (1980).

6. See, e.g., RICHARD O. LEMPert & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 520-25 (2d ed. 1982).

An argument that such a change should be made will not, however, surprise anybody familiar with evidentiary debate. Second, I believe the theoretical foundation of so important a doctrine is always a valid subject of inquiry, even without any prior thought that any change of doctrine might result. Such an inquiry might, in fact, reveal the extent, if any, to which a theoretically ideal doctrine differs from the doctrine actually in place. If the practical considerations in implementing the ideal doctrine are not too daunting, then the theoretical inquiry may itself be part of an argument for reform. This Article therefore tries to develop from the ground up part of the framework for an ideal law of hearsay, without any preconceptions or constraints imposed by current doctrine.<sup>7</sup>

As the previous sentence suggests, this Article works only toward a partial theory of hearsay. The Article is not concerned, except where otherwise noted, with the context in which a criminal prosecutor offers hearsay evidence against the accused. That, of course, is the context in which the Confrontation Clause of the Sixth Amendment to the Constitution comes into play.<sup>8</sup> The confrontation right raises considerations not present with other hearsay. Under current doctrine, there is a close link between the ordinary law of hearsay and the law of the Confrontation Clause.<sup>9</sup> I am convinced that, unless this

---

7. Lest there be any doubt—the system proposed here is meant to supplant, not supplement, the present hearsay system.

8. The Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

9. Under the test articulated in *Ohio v. Roberts*, 448 U.S. 56 (1980), hearsay offered by the prosecution is not admissible unless the declarant is unavailable and the evidence demonstrates sufficient "indicia of reliability"; the second branch of this test may be satisfied "without more" if "the evidence falls within a firmly rooted hearsay exception." *Id.* at 66. I do not believe the test is a workable one, and the Supreme Court has treated it rather shabbily. See *Lee v. Illinois*, 476 U.S. 530, 544 n.5 (1986) (refusing to consider whether a confession should be considered to fit within the "firmly rooted" exception for declarations against interest, and so to satisfy the reliability test without further inquiry); *United States v. Inadi*, 475 U.S. 387, 394 (1986) (holding that, in *Roberts*, the Court did not intend to establish the unavailability requirement for hearsay other than prior testimony). Nevertheless, at least until recently, the Court continued to insist that it adhered to the *Roberts* test. See *Idaho v. Wright*, 110 S. Ct. 3139, 3146-47 (1990). After *White v. Illinois*, 112 S. Ct. 736 (1992), however, it may be that the Court will not impose the unavailability requirement as a matter of Confrontation Clause law on any statement that fits within one of the categorical exceptions of Rule 803(1)-(23) of the Federal Rules of Evidence. The ordinary exclusion of hearsay evidence under Rule 802 does not apply to statements fitting within those exceptions, irrespective of whether the declarant is available to testify at trial. The brief discussion of

link is broken, neither subject can be developed in a satisfactory manner. The need to protect criminal defendants' confrontation rights will tend to make hearsay law more restrictive than it ought to be, and the need for a practical law of hearsay will make the confrontation guarantee less protective than it ought to be. I believe the link can be broken by articulating the confrontation guarantee in terms that have nothing to do with hearsay doctrine, and under which some hearsay offered by the prosecution would not even present a confrontation issue.<sup>10</sup> That, however, is not the subject on which I want to concentrate. Thus, to avoid a great deal of complexity, this Article will not deal, except briefly, with prosecution evidence. When I do consider such evidence, I will assume that, for reasons extraneous to the theory presented in this Article, the Confrontation Clause presents no problem.

I will limit the discussion in other ways as well. For one thing, although I have said that I want to develop a theory unconstrained by current doctrine, the analysis here will focus on evidence that fits within the core of the standard definition of hearsay. That is, I will assume that the evidence is proof of a statement made out of court, and that it is offered to prove the truth of a matter asserted in the statement.<sup>11</sup> By thus assuming away the question of whether the challenged evidence is hearsay, we can concentrate instead on the issue of when hearsay should be admitted. Most of the analysis presented here, I believe, could apply equally well to evidence in the fuzzy area just outside the standard definition—for example, to evidence of a

---

the Confrontation Clause presented here is substantially similar to, but updated from, that in Richard D. Friedman, *Improving the Procedure for Resolving Hearsay Issues*, 13 CARDOZO L. REV. 883, 885-86 nn.8-9 (1991).

10. In rough terms, I believe that the Confrontation Clause should be construed to exclude evidence of an out-of-court statement offered by the prosecution, regardless of the declarant's availability, if the declarant made the statement with the anticipation that it might be used in the investigation or prosecution of a crime and the accused has not had an adequate opportunity to examine the declarant. Cf. Michael H. Graham, *The Confrontation Clause, the Hearsay Rule, and Child Sexual Abuse Prosecutions: The State of the Relationship*, 72 MINN. L. REV. 523, 593-95 (1988) (suggesting a test similar in nature but applicable only to available declarants). I would apply this test absolutely, though the accused might forfeit his confrontation right if he wrongfully rendered the maker of the statement unavailable—such as by intimidating, kidnapping, or killing her. Under this approach, if a hearsay statement did not fit within the confrontation protection, the accused still might assert a constitutional right to have the statement excluded unless the prosecution produced the declarant (at least if the declarant was available), but such assertions should be decided under general and flexible standards of due process.

11. See FED. R. EVID. 801(a)-(c) (providing the basic definition of hearsay).

person's conduct offered to prove the truth of a belief apparently reflected in the conduct—or even to evidence further removed from the usual reach of hearsay law. If that is true, it may mean that a sound approach to hearsay law would not depend on anything resembling the current definition of hearsay. It might even mean that the concept of hearsay would disappear into a doctrine of broader scope.<sup>12</sup> For now, however, I am not concerned with demonstrating that point, or testing the full reach of the analysis presented here. The heartland of hearsay is a large enough area for this Article to explore without having to worry about the borderland or the outland.<sup>13</sup>

## II. THE BASIC HEARSAY MODEL

The discussion will focus on cases fitting the following pattern: One party, the *proponent*, makes known his desire to introduce evidence of a hearsay statement made by an out-of-court *declarant*. For now, we will assume that the proponent gives notice of this intention well before trial. If the declarant were to testify at trial to the substance of her out-of-court statement, the testimony would have sufficient probative value to warrant admissibility, and no other factor would result in exclusion of the evidence. Evidence from this particular declarant—that is, either her out-of-court declaration or her in-court testimony—is irreplaceable, in the sense that even if the proponent produced all the other relevant evidence that he could, the declarant's evidence would have substantial probative value.<sup>14</sup> The proponent's adversary, the *opponent*, raises a hearsay objection to the evidence. He points out that the evidence is defi-

---

12. Under such a broader doctrine, the court generally would not rule an offered item of evidence inadmissible, on the basis of the possible availability of other evidence of the proposition that might be better from the court's point of view, as long as: the procedures for presenting the better evidence are substantially the same whether the proponent or the opponent produces it; the offered evidence is more probative than prejudicial; and the opponent is not substantially less able than the proponent to produce the better evidence. The first of these conditions is simply a matter of the court's rules and generally should be maintained. If the second condition also holds but the third does not, then all or part of the burden of producing the better evidence usually ought to be imposed on the proponent. If the second condition does not hold, so that the offered evidence is more prejudicial than probative, it generally should be excluded—but not necessarily if the opponent is substantially better able than the proponent to produce the better evidence.

13. Cf. Charles T. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489 (1930).

14. I address briefly the situation in which there might be a full replacement for evidence from the declarant. See *infra* note 60.

cient, as compared to live testimony, in several respects. Most importantly, the declarant did not make the prior statement under oath, the opponent cannot cross-examine her, the jury cannot observe her demeanor, and there may be doubt about whether the declarant even made the statement.

Figure 1 presents the situation, as it is ordinarily understood, once the hearsay issue is presented to the court. Under the standard doctrine, the court has two basic choices, which I will label EXCLUDE and ADMIT, in response to the hearsay objection. The court's ruling determines the presumptive evidentiary result—that is, the result that will prevail if the losing party decides to DO NOTHING in response to the ruling. If the court decides to EXCLUDE the hearsay and the proponent decides to DO NOTHING, that result is NE—no evidence from the declarant is received, either in the form of hearsay or by live testimony. If, on the other hand, the court decides to ADMIT the hearsay and the opponent decides to DO NOTHING, the evidentiary result is H—meaning that the court admits the hearsay and the declarant does not offer any live testimony.

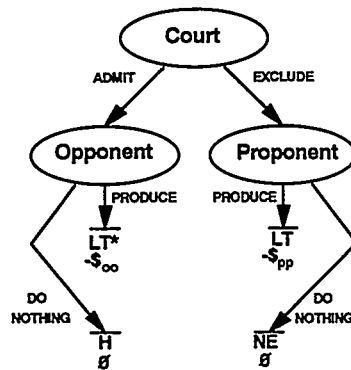
The presumptive evidentiary result is not necessarily the final one, however. Whichever party loses on the hearsay motion may, instead of choosing to DO NOTHING, decide to PRODUCE the declarant. As is frequently recognized, if the judge decides to EXCLUDE the hearsay, the proponent may PRODUCE the declarant as a witness at trial, assuming that this is feasible, so that he will get the benefit of the declarant's evidence. Indeed, this inducement to produce "better evidence" is one possible justification for some applications of the ban on hearsay.<sup>15</sup> If the proponent does select PRODUCE, the evidentiary result will be live testimony by the declarant, indicated by the notation LT.

A corresponding possibility also is apparent, though it seems to be less consistently borne in mind. If the judge decides to ADMIT the hearsay, the opponent also may decide to PRODUCE the declarant as a trial witness (again assuming this is feasible). His motivation would be to eliminate the defects in the hearsay evidence about which he complained. When the opponent does produce the declarant, the prevailing procedure for examining her is, as explained in Part III, different from that used when the proponent produces her. Hence, the nota-

---

15. See, e.g., Dale A. Nance, *The Best Evidence Principle*, 73 IOWA L. REV. 227, 282-83 (1988).

Figure 1



tion  $LT^*$  indicates the evidentiary result of production by the opponent.

Figure 1 indicates not only the possible evidentiary results but also the costs of each. I assume that if the proponent is not produced, there is no substantial out-of-pocket cost, whether the court admits the hearsay or not.<sup>16</sup> Thus, 0 is marked under both H and NE. If the proponent produces the declarant, the cost is  $\$_{pp}$ , while if the opponent produces her it is  $\$_{oo}$ . The first subscript in this notation indicates who bears the cost, while the second indicates which party physically produces the declarant. The two parties do not necessarily have the same production costs. The double subscripts are necessary because, as we shall see in Part V, it may be possible for one party to bear the costs of the other producing the declarant. For now, though, we will assume that each party bears its own costs of production.

### III. PROCEDURAL IMPROVEMENTS FOR EXAMINATION OF THE DECLARANT

In an earlier Article, I proposed simple changes in the manner in which the declarant should be examined when produced as a witness at trial.<sup>17</sup> Because these changes are crucial

16. Although this assumption will simplify matters, it is not crucial to most of the analysis that follows; if the time or money required to produce the hearsay is significant, these costs can be considered, along with the prejudicial potential of the hearsay, as part of the total negative consequences of admitting the hearsay.

17. See Friedman, *supra* note 9, at 892-904.



to the reformulation of hearsay law that I propose in this Article, I will summarize them and the considerations underlying them.

For several reasons, LT, the procedure followed for examination of the declarant if the court excludes the hearsay and then the proponent produces her as a witness, generally is superior to LT\*, the procedure traditionally followed if the court admits the hearsay and the opponent produces the declarant. I therefore propose that LT ordinarily be implemented even when the opponent produces the declarant.<sup>18</sup>

First, consider LT. The court has excluded evidence of a hearsay statement by an absent declarant, and the proponent has responded by producing the declarant as a witness. Now the proponent calls her to the witness stand as part of his case and ordinarily asks her for her current testimony concerning the underlying event or condition that was the subject of the hearsay statement. Sometimes, even though the court excluded the hearsay given the absence of the declarant, it might admit the hearsay given that the declarant is testifying. In any event, once the proponent is finished examining the declarant, the opponent may cross-examine her. The opponent's counsel has effective means of limiting her risks in cross-examining the declarant.<sup>19</sup> Simply rising to cross-examine a witness already on the stand will not necessarily raise significant jury expectations as to what she expects the cross to yield. If she makes any headway at all, she often can give the impression that she is not particularly disturbed by the direct testimony and is satisfied by the cross.

Now consider LT\*. The court has admitted evidence of the hearsay statement as part of the proponent's case, and the opponent has responded by bringing the declarant to court as a witness. The opponent cannot, however, subject the declarant to questioning until after the proponent finishes producing his evidence; in the meantime, the hearsay statement may sink into the minds of the jurors. The opponent finally has a chance to question the declarant when it is time for him to present evidence (either as part of his case-in-chief or on rebuttal), but that means that he must interrupt the presentation of his own

---

18. Similarly, LT should be followed if the court splits the burden of producing the declarant between the parties (as I suggest the court should sometimes do) and the declarant is produced. *See infra* pp. 770-80.

19. *See, e.g.,* Paul B. Bergman, *A Practical Approach to Cross-Examination: Safety First*, 25 UCLA L. REV. 547, 555-75 (1978).

version of events, shifting the focus back to the proponent's. Indeed, calling the declarant to the stand is likely to result in a repetition of the prior statement, thus increasing its impact on the jury. Perhaps most troublesome to the opponent, the jury will recognize that the opponent has brought the declarant to the stand. This is likely to give the jury the impression that counsel finds the testimony sufficiently damaging to be worth the trouble of calling the declarant as a witness. Calling the declarant will also tend to create higher jury expectations for what counsel hopes to accomplish; if the examination does not yield any significant concessions, the jury is likely to regard it as a failure, and therefore may place increased reliance on the hearsay declaration.

These problems, making LT\* more risky and less effective than LT, are significant, and they account in large part for a striking disparity. When the proponent presents the live testimony of a witness, the opponent's counsel most often will rise and ask at least a few questions on cross-examination. On the other hand, when a court allows the proponent to introduce the hearsay statement of an absent declarant, even a declarant who is readily available, the opponent very rarely responds by producing the declarant. This comparison suggests that the courts' use of LT\*, rather than LT, when the opponent produces the declarant of an admitted hearsay statement is usually detrimental to the truth-determining process. The opponent is less likely to examine the declarant, and less likely to do so effectively, under LT\* than under LT.<sup>20</sup>

Therefore, I have proposed that, even when the opponent produces the declarant, the LT procedure ordinarily should be followed. Thus, if the court decides to ADMIT the hearsay, that ruling ordinarily should determine only what the evidentiary result will be if the opponent does not produce the declarant. But if the opponent undertakes to PRODUCE the declarant by a prescribed time, and does so, the court should require the proponent to put the declarant on the stand or forgo use of the hearsay. Assuming that the proponent does put the declarant on the stand, he would examine her on direct, and the opponent then would cross-examine—all in ordinary course, just as if the proponent had produced the declarant. Indeed, ordinarily the jury would not even have to know that the opponent had brought the declarant to court.

---

20. For a fuller analysis of the reasons why LT\* is inferior to LT, see Friedman, *supra* note 9, at 892-904.

Thus, regardless of the manner in which the declarant is brought to court, the proponent ordinarily ought to examine her first, as part of his case. Furthermore, I have proposed that, if a court follows this procedure and the declarant testifies, the proponent's questioning should follow a sequence that is sometimes, but not always, used under current practice. The proponent first should ask the declarant for her current testimony concerning the underlying event or condition that is the subject of the hearsay statement. Only after that should the court make the final decision whether to admit the hearsay statement. This sequence best allows the court to assess the probative value and prejudicial impact of the hearsay statement.<sup>21</sup> It also provides some assurance that the proponent is not offering the hearsay in lieu of the declarant-witness's live testimony because he anticipates that the live testimony would not favor his case as much as the hearsay statement would.<sup>22</sup>

As an illustration of how the procedure I have suggested would work, consider the following hypothetical.

*Hypothetical 2: Same facts as Hypothetical 1, except for the following: Propco has made known its intention to offer the memo the week before the trial. The court believes that the memo is substantially more probative than prejudicial<sup>23</sup> and is inclined to admit it. Oppco insists, however, that it is willing and able to produce the author of the memo, if necessary, but that it does not want to be forced to put her on the stand itself.*

In this case, the court might follow a modified form of the ADMIT procedure, as indicated by the left branch in Figure 2. Under this procedure, the court holds the hearsay presumptively admissible but gives Oppco until a prescribed time in the trial, during the presentation of Propco's evidence, to produce the declarant. Until then, the hearsay will not be admitted. If Oppco fails to produce the declarant by the prescribed time, as indicated by DO NOTHING, the court will admit the hearsay. If Oppco does PRODUCE her by the prescribed time, but Propco decides not to put her on the stand (DO NOTHING), the hearsay will be excluded.<sup>24</sup> If Propco does PRESENT her on the stand,

---

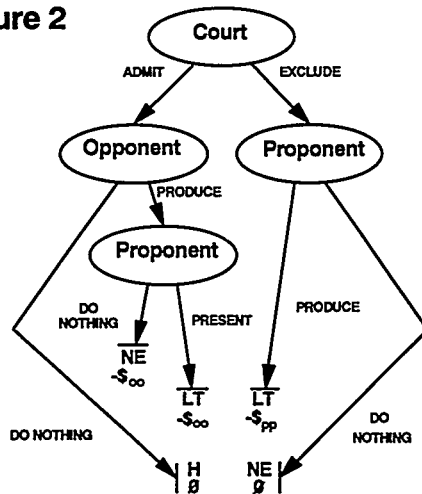
21. See *infra* p. 761.

22. For a fuller statement of the reasons for implementing this order of examination, see Friedman, *supra* note 9, at 900-04; see also *infra* pp. 760-61.

23. As suggested below, this comparison of the probative value and prejudicial potential of the evidence may be a principal determinant of the decision of whether or not to admit the hearsay. See *infra* note 30 and accompanying text.

24. The diagram indicates a cost of \$<sub>oo</sub> if the opponent produces the declarant but the proponent decides not to put her on the stand. This cost might

Figure 2



LT will be followed. That is, Propco will examine the declarant on direct, first asking for her current recollection concerning the underlying event or condition, and then, if it wishes, offering the hearsay statement into evidence. The court will decide whether, given the current testimony by the declarant, it still believes it ought to admit the memo. In any event, once Propco is finished examining the declarant, Oppco will have a chance to cross-examine.<sup>25</sup>

When standard hearsay law excludes evidence, it does so largely on the ground that the opponent has not had a chance to cross-examine the declarant. The problem is relieved only partially by the opportunity that the opponent sometimes has to produce the declarant; even if he does produce her, he gets the benefit only of an inferior form of examination. The procedure I propose offers a solution to the problem more constructive than exclusion of the evidence. When the court believes it is appropriate to relieve the proponent of all or part of the bur-

---

be saved, however, at least in some cases, if, before the opponent produces the declarant, the court asks the proponent to commit as to whether or not he would put the declarant on the stand if the opponent produces her.

25. Obviously, the availability of this procedure depends on the proponent giving enough notice of his intention to offer the hearsay that production of the declarant by the opponent is feasible. In Section D of Part V, *infra* pp. 783-91. I will address the implications of late notice. Until then, I will continue to assume that the proponent has not prejudiced the opponent's ability to produce the declarant by the lateness of notice: If production of the declarant is difficult, expensive, or impossible, it would have been no less so than if the proponent had given more notice.

den of producing the declarant, it may do so and yet enable the opponent, if he is willing and able to carry that burden, to cross-examine the declarant as if the proponent produced her. As the following discussion will demonstrate, the availability of this procedure should therefore alter the way courts respond to hearsay disputes.

First, however, note that, in some cases, it may not be worthwhile to insist on the LT procedure rather than on LT\*. For example, suppose the out-of-court declarant is the opponent himself, and it is obvious to the court both that the opponent will testify in his own behalf and that the hearsay statement ought to be admitted regardless of how the opponent testifies. The court might yet decide, notwithstanding these facts, to follow the LT procedure, perhaps on the ground that the opponent ought not be required to wait until the end of the proponent's case to have a chance to deny the statement or explain it away. On the other hand, often it will make sense to allow the proponent to present the evidence as he wishes, rather than to force him to put his adversary on the stand in the middle of his own case. Of course, the opponent can testify concerning the subject matter of the statement as part of his own case. Presumably, the opponent's counsel will not be hindered in examining the opponent by having to put him on the stand herself.

At least two conditions, both of them present in this example, seem to be essential for the LT\* procedure to be preferable to LT. The first condition is that the hearsay statement would be admissible irrespective of the declarant's expected testimony. The second is that use of the LT\* procedure would not seriously hinder or inhibit the opponent's counsel in examining the declarant. This Article principally concerns the procedures that the court should use to decide hearsay questions and the results they should reach, not the procedure for introduction of evidence that the court already has determined admissible. Hence, the Article will assume that the conditions that might make LT\* preferable do not prevail, and that if the court chooses ADMIT, it will implement the modified procedure presented in Figure 2. In short, no matter which party produces the declarant, the proponent should examine her first.

#### IV. THE CRITERIA FOR DECISION

##### A. INTRODUCTION: THE NOTION OF EXPECTED VALUE

Assuming the hearsay issue is presented to the court, the

court makes its ruling and then, if production of the declarant is feasible, moves by the parties will determine whether or not the declarant actually testifies. The court may conceive of its task as selecting the ruling that has the greatest possible expected value. The expected value of any possible ruling depends on two factors: first, the payoff of each possible outcome that might follow from that ruling, and second, the probability that the parties' moves would yield that outcome, given the ruling. The expected value is the sum of the payoffs, discounted by the probabilities.

Consider Figure 3. This diagram presents in somewhat sim-

**Figure 3**

		<u>Court</u>			
		ADMIT	EXCLUDE		
<u>Opponent</u>	PRODUCE	LT -\$ <sub>oo</sub>	LT -\$ <sub>pp</sub>	PRODUCE	<u>Proponent</u>
	DO NOTHING	H 0	NE 0	DO NOTHING	

plified form the chief possibilities indicated by Figure 2. As in Figure 2, the court has only two choices, ADMIT and EXCLUDE, represented here by the two columns. Once the court makes its choice, the loser must pick a row, PRODUCE or DO NOTHING. This diagram assumes that, if the opponent loses the initial ruling and chooses PRODUCE, the proponent will present the declarant's live testimony rather than forgo use of the hearsay. Thus, there are four possible outcomes, each represented by a cell of this matrix. Note that LT rather than LT\* is entered in the ADMIT-PRODUCE cell. This reflects the proposal, discussed in Part III, that the court ordinarily implement LT rather than LT\*, no matter how the declarant might be produced. The expected value of ADMIT is the payoff of the ADMIT-PRODUCE cell, discounted by the probability that the opponent would produce the declarant if the judge selected ADMIT, plus the payoff of the ADMIT-DO NOTHING cell, discounted by the probability that the opponent would *not* produce the declarant given a decision to ADMIT. The expected value of EXCLUDE would be similarly determined by summing the discounted payoffs of the two cells in the right-hand column. Thus, the choice of a ruling seems to be the choice of the column with the greater expected value.

That might seem a simple enough approach, but even in

theory it would often work badly. Section B of this Part introduces the criteria for evaluating the payoffs of any given outcome. It will reveal a difficulty facing the court: Accurately gauging the payoffs depends in large part on information to which the parties have superior access. Section C will show that the courts often have a similar difficulty in assessing the probability of each outcome. Frequently, then, the court will have difficulty making any satisfactory determination of the expected value of each ruling.

Fortunately, these problems need not prevent the court from making a sensible ruling on the hearsay issue. In Part V, I will show how the court can allocate the burden of producing the declarant in a way that, given the information available to the court, optimizes the expected result.

## B. COMPONENTS OF THE PAYOFFS

Under the somewhat simplified model presented here, the outcome of the court's ruling will include one of three evidentiary results, H, NE, or LT.<sup>26</sup> The outcome also includes a cost result. Figure 3 pictures three possibilities: 0 if the evidentiary result is H or NE,  $-\$_{oo}$  if the opponent produces the declarant, and  $-\$_{pp}$  if the proponent produces her. There are other possibilities as well, discussed in Part V, if the court splits the burden of production.

From the court's point of view, the payoff of the outcome may have four separate components, which I will refer to as the impact of the evidentiary result on the truth-determining process,<sup>27</sup> cost, distributive justice, and fairness. I will consider the first two components under the heading of efficiency. An evidentiary result is more efficient than another if, discounting its impact on truth-determination by the cost of producing it, it ap-

---

26. This is a simplification because other evidentiary states are possible. For example, an observer other than the declarant might testify to the same proposition asserted by the hearsay declaration; depending on the court's ruling, it might cause the other observer to testify either in addition to or in lieu of introduction of the hearsay, even though otherwise she would not. Also, the hearsay might be admitted along with evidence concerning foundation facts to assist the jury in determining the reliability of the statement. See *infra* note 60.

27. I am adopting the phrase "truth-determining process" from Confrontation Clause doctrine. See, e.g., *United States v. Inadi*, 475 U.S. 387, 396 (1986); *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (plurality opinion). In the context of the Confrontation Clause, I think the phrase is misleading, suggesting too instrumental a view of the right to confrontation. In other hearsay contexts, though, it seems useful.

pears superior to the other result. This definition, adopted for expository convenience, does not eliminate the problem of incommensurability of truth-determination and cost.

### 1. Efficiency

Efficiency, as just defined, is clearly a critical part of evaluating the outcome of the court's ruling. No absolute scale for measuring efficiency is necessary for the analysis presented here. It suffices to assess the relative merits of the three possible results.

#### a. Comparing H to NE

Recall the assumption that if the declarant is not produced, there is no substantial cost, whether the court admits the hearsay or not. Accordingly, the comparison of H to NE on efficiency grounds is simply a matter of determining which result will have a better impact on the truth-determining process. The court should be able to make this comparison reasonably enough because it essentially knows what each of these results will be when the hearsay issue is posed.

Standard hearsay doctrine points to three significant defects of hearsay evidence. Ordinarily, the hearsay statement is not given under oath nor subject to cross-examination, and it does not offer the fact-finder an opportunity to observe the declarant's demeanor. Another defect, less frequently accepted as part of the reason for the hostility to hearsay, is simply that hearsay requires a longer chain of inference. Instead of knowing firsthand what the declarant's report is, as it would if the declarant testified, the fact-finder must rely on some other evidence of a purported declaration.<sup>28</sup>

These are in fact significant deficiencies of H as compared to LT.<sup>29</sup> But this comparison is not the one now being examined; rather, the comparison is between H and NE. Usually, a court analyzing the problem correctly should conclude that the hearsay is more probative than prejudicial. That is, H is usually preferable to NE from the standpoint of truth determi-

---

28. Roger C. Park, *A Subject Matter Approach to Hearsay Reform*, 86 MICH. L. REV. 51, 56-58 (1987), calls particular attention to this factor.

29. But see Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1078-88 (1991) (casting doubt on the value of demeanor in assessing credibility). At the same time, the hearsay has at least one potentially significant advantage over live testimony: It was made closer to the events it describes and so reflects a fresher memory. But the live testimony can, if necessary, be supplemented by the hearsay. See *infra* pp. 760-61.



nation, notwithstanding the deficiencies of the evidence.<sup>30</sup>

It is true that—at least in a jury trial, and at least theoretically—the hearsay may have substantial prejudicial impact. The oath, demeanor evidence, and cross-examination are all aids that the jury lacks in determining the accuracy of the declaration, and without their assistance, the jury may put too much credence in the declaration, according it greater probative value than it ought to have. The evidence must in fact have substantial probative value, however. If it did not, the court would reject the evidence without reaching the hearsay question. To conclude that the prejudicial impact outweighs the probative value means not only that the jury would overvalue the evidence, but also that the degree of the overvaluation would exceed the actual probative value (however that is to be determined). In other words, in this situation, when the choice is between admitting the hearsay (evidentiary state H) and forgoing any evidence from the declarant (evidentiary state NE), excluding the hearsay to assist the truth-determining process is appropriate only if the jury is likely in some sense to accord the evidence more than twice the probative value that it “ought” to have.

That is overvaluation to a high degree. Depending on how we define probative value, that degree of overvaluation may even be impossible in some situations. If the prior probability of the proposition that the evidence was offered to prove was high enough, and if the “actual” probative value of the evidence is great enough, thus increasing that probability further, there

---

30. Although I will now fill several pages defending this general proposition, which is hardly an original point, *see, e.g.*, Weinstein, *supra* note 5, at 335-36, I should emphasize its limited role in this Article. Under the system I will propose in Part V (as well as other proposed hearsay systems, and perhaps also the current system), whether or not the *particular* hearsay appears more probative than prejudicial is an important datum in determining the court's optimal ruling on *that* hearsay. I believe that the manner in which courts make the probative-prejudicial determination in particular cases should be informed by the considerations discussed here. In particular, the court should approach the question with an expectation—perhaps a mild presumption—that, assuming live testimony would be more probative than prejudicial, the hearsay statement would be as well. Apart from such inferential concerns, however, the particular ruling does not depend on what is true in the run of cases. The question of whether, or the extent to which, the general proposition concerning the probative-prejudicial balance is true affects only the overall nature of the results yielded by the system proposed here, not the result in a particular case. Nor does it affect the validity of the system itself. If hearsay is net prejudicial more often than I suppose, then the result of my system should be to exclude the hearsay more often than I suppose—but that in no way undercuts the system's value as the proper framework for decision.

may not be enough room below the ceiling of certainty for the jury to perceive the evidence as having double the probative value.<sup>31</sup> More importantly, there is no empirical support for the proposition that juries overvalue hearsay substantially, much less that they overvalue it to such a great degree. Indeed, to the extent that empirical research has examined the question, it appears that, in fact, juries substantially discount the value of hearsay evidence, as we would like them to do.<sup>32</sup> It is even conceivable that at times juries over-discount. For exam-

---

31. How to measure probative value formally is a matter of some debate. David Kaye and I exchanged views on this in a previous evidence symposium. See Richard D. Friedman, *A Close Look at Probative Value*, 66 B.U. L. REV. 733 (1986); Richard D. Friedman, *Postscript: On Quantifying Probative Value*, 66 B.U. L. REV. 767 (1986); David H. Kaye, *Comment: Quantifying Probative Value*, 66 B.U. L. REV. 761 (1986). I have defined probative value, in accordance with Federal Rule of Evidence 403, as the arithmetic difference between the posterior and prior probabilities of the material proposition. This definition may be overly simplistic; certainly it has been strongly criticized. Nevertheless, I will use the definition here to demonstrate the proposition stated in the text, even though it is peripheral to my main argument; I hope that readers who find this definition of probative value unacceptable will simply ignore this demonstration, and, if necessary, the proposition stated in the text, rather than let this technical argument distract them from my main points.

Let  $p$  equal the prior probability of the material proposition, and  $L$  equal the likelihood ratio of the evidence (the probability that the evidence would arise if the proposition were true divided by the probability that the evidence would arise if the proposition were not true). The posterior probability of the proposition—that is, the probability of the proposition given the evidence—as indicated by Bayes' Theorem is

$$pL/(pL + 1 - p),$$

and the probative value of the evidence is

$$pL/(pL + 1 - p) - p.$$

If the fact-finder accords the evidence twice its "true" probative value, that means that the posterior probability of the evidence, according to the fact-finder, is

$$p + 2[pL/(pL + 1 - p) - p].$$

This expression cannot be greater than 1, representing certainty. By simple algebraic manipulations, this means that

$$[2pL - p(pL + 1 - p)]/(pL + 1 - p) < 1,$$

and that

$$pL + p(L - 1)(1 - p) < pL + 1 - p,$$

which reduces to

$$p(L - 1) < 1.$$

In other words, if

$$p(L - 1) > 1,$$

then, using this scheme of measurement, the prejudicial overvaluation of the evidence cannot be greater than the "true" probative value of the evidence.

32. See Margaret Bull Kovera et al., *Jurors' Perceptions of Eyewitness and Hearsay Evidence*, 76 MINN. L. REV. 703, 714-16 (1992); Peter Miene et al., *Juror Decision Making and the Evaluation of Hearsay Evidence*, 76 MINN. L. REV. 683, 691-98 (1992); Richard F. Rakos & Stephan Landsman, *Researching the Hearsay Rule: Emerging Findings, General Issues, and Future Directions*,

ple, in cases in which it would not have been physically impossible to produce the declarant, the jury may accord excessive significance to the proponent's failure to do so.

This argument suggests that the risk that the jury will minimize hearsay dangers is rarely so threatening in itself to the fact-finding process that the hearsay evidence should be considered more prejudicial than probative. This in turn suggests that, if live testimony of a given proposition would be more probative than prejudicial, then the hearsay usually would be as well. This conclusion, however, is subject to at least three caveats.

First, the court may believe in a given case that the probative value of the evidence barely outweighs its prejudicial potential, even before it considers the hearsay dangers. The court may be concerned, for example, that the proposition the hearsay is offered to prove, even if true, is of only meager value to the case but may well inflame the jury. If so, the hearsay dangers might provide a marginal reason to tip the balance the other way. Even here, however, a court should take care. Inferring that the jury is likely to attribute clearly excessive value to the hearsay requires not only a prediction about jury behavior but also, in effect, a good deal of confidence that the court itself is not attributing insufficient value to the evidence.<sup>33</sup> Only rarely should a court be so confident that its judgment will be so far superior to the jury's that exposing potentially probative evidence to the jury should be deemed a net detriment to the truth-determining process.<sup>34</sup>

---

76 MINN L. REV. 655, 658-64 (1992). *But see* Richard O. Lempert, Presentation at Hearsay Reform Conference (Sept. 7, 1991).

33. Of course, courts substitute their judgment of the evidence for the jury's when they grant a directed verdict or judgment n.o.v. on the ground that the evidence is insufficient to support a contrary verdict. In those cases, however, the court rules in effect that a reasonable jury acting properly could not make a given finding; accordingly, such a finding would demonstrate—if the court gave the jury a chance to make it—that the jury did not perform its task properly, and so would be insupportable. The court's ruling alters only the result, not the base of information on which the jury makes its finding. When the court excludes probative evidence as potentially prejudicial, by contrast, it limits the jury's information base because of fear that the jury may use the information improperly to reach a verdict that it could find properly on the basis of other evidence. (If the jury could *not* find the verdict properly, then a directed verdict or judgment n.o.v. would be appropriate.) The court thus keeps the jury from considering evidence that the jury might have used properly; presumably the evidence had sufficient probative value to warrant admission, for otherwise it should have been excluded on that ground without reaching the question of prejudice.

34. Note that throughout this discussion, I am using "jury" as a proxy for

Second, the very fact that the proponent has chosen to offer the hearsay, especially if he might have offered live testimony instead, may be significant. Often the cost or difficulty of producing the declarant is sufficient explanation; the hearsay may well be a second-best choice for the proponent. In some cases, however, even putting cost and difficulty aside, the proponent may prefer the hearsay to live testimony. It may be that the proponent has reason to believe that the declarant would have a poor demeanor, would crumble under aggressive adverse questioning, or would depart from the hearsay statement. Such possibilities do not necessarily imply that the proponent regards the hearsay as more prejudicial (in his favor) than probative, but they might.<sup>35</sup> Often, after the court questions the proponent's counsel, if not before, the opponent will be in as good a position as the proponent to assess these possibilities,<sup>36</sup> and, if so, he may be able to inform the jury of

---

"fact-finder" and "court" as a proxy for "decision maker." The same essential points would hold given other divisions of these two functions. The fact-finder might be a judge rather than the jury. However weak may be the argument that hearsay tends to be overvalued when the fact-finder is a jury, the argument is weaker yet when the case is tried by a judge, who is presumably at least as aware of the dangers of the hearsay as a jury would be. The effective decision making on admissibility might be made by an appellate court, a code-making body, or the legislature, rather than by the trial court. Such a body might have better information of a general nature bearing on the probative value and prejudicial potential of hearsay, or categories of hearsay, than does either the trial court or the jury, but it obviously lacks as full information concerning the particular case.

35. Here is a schematic way of thinking of the problem: The probative value of the evidence is the benefit that the proponent would gain from the live testimony, and the prejudicial impact is the incremental benefit, if any, above the probative value that the proponent would gain from the hearsay. See *supra* note 31 and accompanying text (defining probative value in mathematical terms). Thus, if the proponent believes that the live testimony would help his cause more than half as much as the hearsay would, then he believes that the hearsay would be net probative to the truth-determining process. (*A fortiori*, the proponent believes that the hearsay is net probative if he believes that, while the hearsay is helpful to his case, the live testimony would be more helpful.) If, however, the proponent believes that the live testimony would offer him less than half the benefit that the hearsay would, or would actually be counterproductive to him, then he believes that the hearsay would be net harmful to truth determination.

36. The opponent will be in a worse position to do so only if the proponent has, or had, superior access to the declarant. In a civil case, however, if the proponent can communicate with the declarant, then presumably the opponent could eliminate at least a large part of the differential by taking the deposition of the declarant. Whether or not the opponent takes the deposition, the court can question the proponent's counsel closely when the hearsay issue is litigated in order to determine whether she has any reason, other than the cost and difficulty of producing the declarant, for preferring the hearsay.

them.<sup>37</sup> Sometimes, though, the opponent will be unaware of these possibilities, or unable to inform the jury of them adequately. Thus, in some cases, there is a residual possibility that the proponent has offered the hearsay because of its prejudicial potential and the opponent is unable to recognize the problem, or at least to counter it with particularity. Even when this difficulty arises, however, it need not be crucial. It is likely to arise only when the proponent has superior access to the declarant and the evidence is sufficiently significant that the proponent would be expected to produce the declarant, if her testimony would favor him. These are the circumstances in which a "missing witness" argument, perhaps supplemented by an instruction from the court, is appropriate and likely to be persuasive. Such an argument invites the jury to infer that the live testimony would have been unfavorable to the proponent. In short, while the jury may be unable to evaluate adequately the possibility that the proponent's decision to offer the hearsay was motivated by perceived problems in the live testimony, the jury may well infer prophylactically that the motivation was manipulative. This would eliminate at least much of the prejudicial benefit that the hearsay might otherwise have offered the proponent.

The third caveat is that the court must consider the impact of hearsay dangers on the probative value side of the scale, as well as on the prejudicial impact side. Because of those dangers, the hearsay has less probative value than the live testimony would. Not only is it harder even for a hypothetically ideal fact-finder to evaluate the credibility of an absent declarant, but the probative value of the hearsay must be discounted by the possibility that the declarant did not even make the statement attributed to her. Perhaps, for example, a witness has concocted a statement of a supposed declarant to help the proponent's case. Occasionally, at least in a case where admissibility of the live testimony would be marginal (because, for example, the proposition asserted is of slight materiality), a court reasonably may conclude that this differential in probative value is enough to tip the probative-versus-prejudicial balance against the hearsay. Note that this differential does not depend on any perception of jury defect. It is an appropriate factor to

---

37. The fullest means of informing the jury would be to produce the declarant as a witness. Here, though, I am assessing the situation in which the hearsay is admitted but the declarant does not testify.

weigh into the balance, though only rarely should it make a decisive difference.

b. *Comparing LT to H and to NE*

Ordinarily, it is easy enough for the court to conclude that, considering only the impact on the truth-determining process, LT is superior to both H and NE. As compared to H, live testimony is superior for all the usually cited reasons—cross-examination, demeanor, oath—and because it avoids any doubt about whether the declarant made the statement attributed to him. The prior statement may appear to have one significant advantage over the declarant's current testimony: It may represent a substantially fresher memory of the events. But that is no reason to prefer admission of the hearsay, with the declarant absent, to her live testimony. If the declarant testifies live, the court can always admit her previous statement if it appears that the statement would add anything of value to the current testimony.<sup>38</sup> Given this, LT can only be better than H for truth-determination.

As compared to NE, we may assume that LT is superior for truth-determination. If it were not—that is, if even the live testimony were more prejudicial than probative—then presumably the court would exclude the hearsay evidence without even considering its hearsay dangers.

The problem, though, is determining *how much* better LT is than either H or NE. We have assumed that the presentation of the hearsay will not in itself require any significant expenditure of resources.<sup>39</sup> Thus, the efficiency comparison between H and NE does not depend on any cost considerations. Producing the declarant may be costly, however, and the court should be concerned about how much cost the parties incur as a result of its ruling. Hence, the efficiency comparisons between a decision yielding LT and one yielding H, and between decisions yielding LT and NE, depend on whether the difference in impact on the truth-determining process is worth the cost. Moreover, the cost might differ depending on which party produces the declarant.

Each party is probably in a better position than the court to

---

38. See *infra* pp. 760-61 (discussing situations in which the declarant already is testifying). As discussed in Part III, if the declarant testifies, she ought to be asked to testify concerning her current recollection before the admissibility of her hearsay statement is determined. See *supra* p. 732.

39. See *supra* p. 729.

assess how expensive it would be for that party to produce the declarant. Even if the court has good information on costs,<sup>40</sup> that does not solve the problem of determining whether LT is sufficiently better than H or NE for truth determination to warrant the cost of producing the declarant. In our adversarial system, courts usually do not decide themselves whether an item of evidence is worth the cost of production. Instead, courts generally leave the decision to the party who would benefit from its production; that party likely is in a better position than the court to determine the probable nature of the evidence and the extent of the benefit. Indeed, the party ordinarily is encouraged to make an efficient decision because the court imposes the costs of producing the evidence on him.

## 2. Distributive Justice

Arguably, distributive justice<sup>41</sup> is an appropriate factor in evaluating an outcome. In some cases, there is a significant disparity in the parties' ability to pay for producing the declarant, as suggested either by their overall wealth or the extent to which they have been willing to devote resources to the litigation. In such a case, the court might take this disparity into account, on the ground that, if the declarant is to be produced, justice calls for the production to be paid for by the party better able to do so. At least arguably, though, it is inappropriate for the court to attempt to alter distribution of wealth in this way.<sup>42</sup> Having offered the suggestion, therefore, I will neither

---

40. In Part V, I assume that the court does have some information on costs, albeit not necessarily as much as the parties themselves.

41. Cf. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 547 n.40 (1972) (noting that distributive justice is defined in terms of wealth and status rather than conduct).

42. Hearsay litigation is, at best, a clumsy method for redistribution of wealth. See *id.* ("What is at stake is keeping the institution of taxation distinct from the institution of tort litigation."). On the other hand, if one party has greater wealth than the other, or has devoted more resources to the litigation, this suggests he is more willing to pay to avoid an undesired evidentiary result; arguably, then, payment by him of the cost of producing the declarant leads to a more satisfying distribution. It would be difficult for a court to determine more precisely which party is more willing to pay to avoid a disfavored evidentiary result. Perhaps in some cases it could try this technique: In separate conversations (because it is saying different things, or at least varying its emphasis), the court tells the proponent that it is prepared to exclude the hearsay and tells the opponent that it is prepared to admit the hearsay. The court tells each party that the only way it can guarantee to avoid this result is to bid a sum that is both greater than his adversary's bid and sufficient to produce the declarant. The court then relays bids back and forth, and the highest bidder loses. Thus, if the proponent is the highest bidder, the hearsay is excluded,

defend it nor rely on it; I will put it aside. I will consider separately whether it is appropriate for the court to take into account for another reason the parties' relative ability to pay—not out of a sense of distributive justice, but on the ground that the most efficient result is most likely to be reached if the burden of producing the statement is imposed on the party best able to bear it.

### 3. Fairness

Another consideration of justice, which may be referred to by the shorthand of fairness, is at least presumptively more clearly an appropriate factor to take into account.<sup>43</sup> The question essentially is this: Given all the facts, does any consideration of fairness suggest which party should bear the burden of producing the declarant and suffer an unfavorable evidentiary result if the declarant does not testify?<sup>44</sup>

Most American lawyers, I suspect, would respond instinctively that the proponent ordinarily should be the disfavored party. After all, it is the proponent who wants to offer evidence from the declarant, and in a form, as hearsay, that the court regards as deficient compared to live testimony.<sup>45</sup> Thus, it appears that it is the proponent's job to remove the hearsay problem.

---

except that if his bid is sufficient to produce the declarant, she will testify. This technique depends on deception. For that reason, even putting aside the question of appropriateness, it could not succeed frequently.

43. Cf. Fletcher, *supra* note 41, at 547 n.40 (noting a premise of corrective justice "that liability should turn on what the [party] has done, rather than on who he is").

44. This question is vague in defining what fairness means in this context, for two reasons. First, I mean the term to be a sort of reservoir after other considerations, particularly the evidentiary result and cost, are taken into account. I am thus using the term in a manner similar to the use by Guido Calabresi and A. Douglas Melamed of the locution "other justice reasons." *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105 (1972); cf. Fletcher, *supra* note 41, at 550 (defining a fairness principle in the torts context that "all individuals in society have the right to roughly the same degree of security from risk"). Second, for the reasons explained in the text, I believe that, in the context addressed by this Article (recalling that this does not include the confrontation context), there is no independent consideration of fairness that adds anything in deciding the hearsay question that is not already taken into account by considering the impact of the evidence on the truth-determining process and the cost of producing the declarant. *But see infra* note 46 (discussing possibility of a confrontation-like right in civil cases with respect to statements made in anticipation of litigation).

45. *See supra* pp. 743-44. ("Comparing LT to H and to NE").



I disagree with this point of view—which, I suspect, accounts in large part for the tenacity of the rule presumptively excluding hearsay. Just out of prudence, I should emphasize once more that I am not discussing the context in which confrontation rights may come into play. Outside that context, I believe, fairness generally, and perhaps always, points in the same direction that efficiency does. The basic reason for this congruence is that fairness depends on the same two factors—impact on truth determination and cost—as efficiency does.

It is easy enough to see why these two factors relate to fairness. Suppose first that the court is persuaded that H and NE are equally unsatisfactory for truth determination, that whichever party loses the hearsay motion will surely produce the declarant, and that one party could produce the declarant easily whereas the other could do so only with great difficulty. Here, it seems fair as well as efficient to impose the burden of producing the declarant on the party who can do so at least cost.

Now consider the following hypothetical:

*Hypothetical 3: Paul is suing Otto for the wrongful death of his wife, Violet, as the result of an auto accident. He wants to introduce the testimony of Wanda Witness that, the week after the accident, Donna Declarant, who had been a passenger in Violet's car, said, "That man ran a red light and hit us broadside." Donna later died of injuries received in the crash. Otto opposes introduction of the hearsay.*

Because the declarant cannot be produced, the outcome will be on the lower row of the basic matrix, Figure 3. In this case, the court need not consider any cost considerations. The declarant will not testify, and, by hypothesis, the hearsay is cost-free to produce.

Otto's counsel, well schooled in traditional hearsay law, may argue as follows: "If the hearsay is admitted, the jurors will consider it even though they will not have had a chance to observe the declarant make the statement, which was not under oath, and even though I will not have had a chance to cross-examine the declarant. That would be unfair." But Paul's counsel might respond as follows: "That is no fault of mine, for I cannot produce the declarant. If the hearsay is not admitted, the jury will be deprived of probative evidence for which there is no adequate substitute. *That* would be unfair."

I believe that resolution of the fairness question must clearly depend, at least in part, on whether the hearsay is more probative than prejudicial. Suppose that it is; in other words, H is superior to NE for truth determination. If we like, we might characterize the result of admitting the hearsay, with no hope

for Otto to examine the declarant, as unfair to Otto. But at the same time we would have to characterize the result of excluding the hearsay, with no hope for Paul to present other evidence from Donna, as unfair to Paul. Given the hypothesis that H is superior to NE for truth determination, the second type of unfairness outweighs the first.

I will draw a stronger conclusion, though it may be a matter of assertion and definition as much as, or more than, one of inference. I believe that, apart from cost considerations, the fairness question (outside the Confrontation Clause context) depends *solely* on truth determination. In other words, putting cost aside, the fairer of two rulings on a hearsay question is the one that best supports the determination of truth.

Perhaps this oversimplifies the nature of civil trials. Perhaps, at least in some civil contexts, there is a fairness interest in protecting, even in derogation of truth determination, the type of symbolic or psychological interests that I believe the Confrontation Clause should be thought to protect.<sup>46</sup> Perhaps such an interest is pervasive, and perhaps in some civil contexts it is strong. But I believe that it is not pervasively strong, and, therefore, I will put it aside, along with the confrontation context.

To say that fairness and efficiency depend on the same factors does not necessarily mean that they always point in the same direction. One may be affected relatively more than the other by a particular factor. Thus, Part V will examine fairness consequences, but it will do so only briefly. If a ruling yields an incremental truth-determination benefit, but at a cost to one party that somehow seems excessive, or if it saves on cost, but at an excessive loss in truth-determination ability, the ruling seems unfair as well as inefficient.

---

46. In my view, the Confrontation Clause generally ought to bar the prosecution from offering a statement made by a declarant who anticipated use of the statement in the investigation or prosecution of a crime, unless the accused has had an adequate opportunity to examine the declarant. *See supra* note 10. Such a rule would often operate in derogation of the truth, but it would offer the accused a sense of fair treatment because he could not be subjected to criminal punishment without a chance to confront his accusers. Arguably, a similar rule should be applied in some civil contexts when the consequences are very grave and especially when the state is a party—when, for example, civil commitment or termination of parental rights is at issue.

### C. FACTORS AFFECTING THE PROBABILITIES OF THE POSSIBLE OUTCOMES

We have seen that, with respect to some of the information that the court would need in evaluating the payoffs of the possible outcomes, the parties have access superior to that of the court. The same is often true if the court attempts to determine the probability of each outcome given its ruling.

Sometimes the court can assess reasonably accurately the difficulty and expense each party would face in producing the declarant.<sup>47</sup> When production by a given party is impossible or unfeasible, the court can predict easily enough that if it places the physical burden of producing the declarant on that party, the declarant will not be produced.

The court will not always be favored with such certainty, however. The probability that a party, on whom the court has imposed all or part of the burden of producing the declarant, actually will satisfy the burden does not depend solely on how difficult that burden is. It also depends on how much (if at all) the party would prefer live testimony to the state that would prevail if he did nothing—that is, to NE if the losing party is the proponent, and to H if the losing party is the opponent. That often will be a difficult judgment for the court to make. Consider the following hypothetical.

*Hypothetical 4: Paul Proponent and Otto Opponent are litigating over the terms of the will of Theresa Testatrix. Paul wants to prove that Theresa was very upset with Otto after a particular run-in, and he makes known his intention to offer the testimony of Wendy Witness that Deborah Declarant said to Wendy, the day after the event, "Theresa was really angry with Otto yesterday." Otto moves to exclude the testimony as hearsay. Deborah is within reach of the subpoena power, but in a distant city. Either party could produce her, but it would be expensive.*

The court might well wonder why Otto made the objection. Did he really regard admission of the hearsay as a worse result than live testimony by Deborah? True, if Deborah testifies live, Otto's cross-examination might render her testimony less credible. But it is also possible, perhaps more likely, that Deborah will be able to testify vividly and memorably to just *how* angry Theresa was, and that cross-examination will not be effective at all. Indeed, it may be that, cost factors aside, Paul would have vastly preferred to offer Deborah's live testimony rather than a second-hand report of her summary out-of-court statement—

---

47. See *infra* pp. 751-52 (discussing assumptions concerning a court's knowledge of difficulty and expense).

and that Otto is relieved that cost did induce Paul to offer the hearsay. It may well be that Otto interposed the objection, not in hopes that it would induce Paul to produce Deborah as a live witness, but in hopes that it would force Paul to do without any evidence at all from Deborah.<sup>48</sup> In short, given the choice between admission of the hearsay and live testimony by Deborah, Otto might affirmatively fear the latter. If that is so, and perhaps even if it is not, Otto will not produce Deborah if the hearsay objection is unsuccessful. It will be difficult, however, for the court to read Otto's mind in advance with sufficient clarity to understand the motivation behind the objection and his likely response to an adverse ruling.

Of course, the court might try to find out how each party would respond to an adverse decision simply by asking him. Often, though, that would be useless or counterproductive. Even if the court could discover a party's intention without distorting that intention by the process of asking, the information would not necessarily be helpful. Suppose, for example, that the judge knows that Otto would not respond to ADMIT by producing Deborah. The court still might not know whether Otto would fail to produce Deborah because the burden of doing so is too great in relation to the benefits he would receive, or whether in fact he prefers admission of the hearsay to Deborah's live testimony.<sup>49</sup>

Moreover, if either party knew that his statement of intent might affect the court's ruling, that prospect might distort his behavior. In an attempt to win the hearsay ruling, he might disclaim an intention to produce the declarant in the event of an adverse decision, even though that would be his best response to such a decision. This consideration leads to a complicated game-playing situation, which the court is probably best off avoiding.<sup>50</sup>

---

48. If Otto were litigating in an inappropriately nasty manner, he might have had the subsidiary hope that, if the objection did result in the production of Deborah as a live witness, at least that might impose costs on Paul.

49. To use a symbolic form, if Otto declines to produce the declarant, it is because he finds  $(LT - \$_{oo}) < H$ —that is, the live testimony, discounted by the cost of production, is less preferable than mere admission of the hearsay. Or, equivalently,  $(LT - H) < \$_{oo}$ —the incremental benefit (if any) of the live testimony over the hearsay does not warrant the cost. But this does not tell the court whether  $\$_{oo}$ , the cost, is large; or whether  $(LT - H)$  is positive but small—that is, Otto would prefer live testimony to hearsay, but not by much; or whether  $(LT - H)$  is negative—that is, Otto would actually prefer mere admission of the hearsay to the declarant's live testimony.

50. The parties might consider giving the court incorrect information as to

In short, the court should restrain the impulse to ask, "What would you do if I held against you?" Instead it will get better information if it concentrates on "just the facts." As I will now argue, a better question, and one on which the court could usually gain adequate information, would be, "How costly and difficult would it be for you to produce the declarant?"

## V. SELECTING A RULING

### A. INTRODUCTION: THE ASSUMED INFORMATION BASE AND A SUMMARY OF THE ANALYSIS

Part IV showed that the court would often have difficulty both in evaluating the payoff of an outcome and in determining how probable the outcome is given a particular ruling. In particular, the court probably will have difficulty determining whether LT is sufficiently preferable for truth-determination purposes to H and NE to warrant the cost of producing the declarant. And often it will have at least as much difficulty determining whether a party bearing all or part of the burden of producing the declarant would find LT so much more advantageous to the alternative result—H for the opponent, NE for the proponent—to warrant satisfying the burden.<sup>51</sup>

These considerations suggest that, as a rule, the court's best course may not be to guess and evaluate the probable outcomes of each possible ruling. Of course, when the court knows that the declarant cannot be produced, it knows what the outcome of its ruling will be—either admission or exclusion of the hear-

---

their intentions, but over the long run this probably would be counterproductive. If the parties committed themselves beforehand, either because they realized they could not be disingenuous or because the court held them to their statements of intention, strategic considerations might dominate their decision making. Interestingly, one possible response by the court would be to adopt a "mixed strategy," introducing a certain amount of randomness into its ruling so that the parties would not know precisely how a given combination of statements of intention would affect the ruling. See ERIC RASMUSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY 69-73 (1989) (explaining mixed strategies).

I do suggest that, in certain situations, the court call on parties to commit themselves in advance as to whether or not they will perform given portions of the burden of producing the declarant—but only after the court has ruled, making clear what the consequences of a given decision or combination of decisions by the parties will be. See *infra* notes 75-76 and accompanying text. Once the court has made that ruling, it has taken itself effectively out of the game, and the parties do not have the opportunity or concern of affecting the court's ruling by making their own choices.

51. See *supra* note 49 and accompanying text (discussing the difficulties in determining the parties' preferences).

say—and it can evaluate those results. But when the court lacks this certainty, its best approach is generally to try to allocate the burden of producing the declarant in such a way that, consistent with fairness, the parties' own self-interest will lead to an efficient result.

This Part will analyze how the court should make that determination. It suggests that the court should base its decision primarily on two factors, and it assumes that the court does have adequate information on these factors. I believe that the court usually can gather this information quickly and efficiently by questioning counsel; decision making under the system I am suggesting need not entail excessive administrative costs.

The first factor is the net probativeness of the hearsay—that is, the extent to which the hearsay is more or less probative than prejudicial. Put another way, the question is whether H is preferable, from the truth-determining perspective, to NE. I will assume that the court can evaluate this factor simply by comparing the state of the proof with and without the hearsay. In other words, the court can evaluate the two alternative presumptive evidentiary results of its ruling.

The second factor is the difficulty and expense each party would have to endure to alter this presumptive evidentiary result by producing the declarant. The court needs some, but not necessarily full, information with respect to this factor. It is to each party's advantage to persuade the court that its costs of producing the declarant are high, but in most cases an inquisitive court, aided if necessary by the adversary's argument, would probably be able to detect substantial inflation in a party's statement of its costs. At least the court usually should be able to determine whether or not one party is substantially better able than the other to produce the declarant. Often that is all the court needs to know.

Thus, Section B assumes, with respect to this factor, merely that neither party has a significant advantage over the other in producing the declarant. It also assumes that the proponent has given adequate notice of his intention to offer the hearsay. Under these circumstances, the court ought to choose the presumptive evidentiary result, H or NE, that best advances truth determination. When the declarant cannot be produced, this ruling is optimal because the presumptive result is the final one as well, and it is fair as well as efficient that the result be the one that is best for determination of the truth. When

production of the declarant is feasible, such a ruling offers benefits beyond the presumptive result. The party losing the ruling makes the decision whether to alter that result to LT by producing the declarant. It is efficient for this party to make the decision, because it is he who is best able to determine whether the benefits he would receive by producing her—which coincide closely with the benefits to the truth-determining process—are worthwhile given the costs. And it is fair that this party bear the costs of producing the declarant, if she is to be produced, because it is he who is dissatisfied with, and wishes to alter, the best result possible in the absence of the declarant.

Note that under this analysis, the court, having satisfied itself that neither party is substantially better able than the other to produce the declarant, need not worry how difficult producing the declarant actually would be.<sup>52</sup> In other words, having concluded that there is no substantial difference between the parties with respect to the second factor, the court can put that factor aside. No matter how difficult production would be—impossible, burdensome, or easy—both fairness and efficiency support admission of the hearsay if (as I have contended is usually the case) the hearsay is more probative than prejudicial.

Section C examines how this conclusion is altered when one party is in fact substantially better able than the other to produce the declarant. Here again, full information with respect to the parties' respective abilities to produce the declarant is not necessary, but it will be helpful for the court at least to have confidence that one party can feasibly produce the declarant and that the other would find production substantially more difficult or expensive. In some circumstances, it makes sense to impose at least part of the burden on the party best able to bear it, even though absent the disparity the considerations addressed in Section B would favor imposing the burden totally on the other party. The best result may involve splitting the burden between the parties, such as by imposing the finan-

---

52. Note the difference from standard hearsay doctrine. Under Federal Rule of Evidence 804, in some circumstances unavailability of the declarant is a decisive factor supporting admissibility of hearsay, even though there is no difference in the parties' respective abilities to produce the declarant. Put another way, under the Federal Rules, availability of the declarant may be a decisive factor supporting exclusion of the hearsay, even though the opponent is as able as the proponent to produce the declarant.

cial burden on the opponent and part or all of the physical burden on the proponent.

Finally, Section D examines the implications of late notice. Sometimes, but not always, a failure to give early notice warrants imposing all or part of the burden on the proponent.

B. SELECTING A RULING WHEN NOTICE IS ADEQUATE AND  
NEITHER PARTY HAS A SUBSTANTIAL ADVANTAGE IN  
PRODUCING THE DECLARANT

This Section assumes that, as is usually the case, it is not substantially easier or less expensive for one party than for the other to produce the declarant. Even if the declarant is a friend of one party, for example, the other might easily secure his attendance by subpoena.

The first three subsections of this Section will examine separately three different situations that lie along a continuum—when production of the declarant is, respectively, impossible, feasible but burdensome, and easy. This breakdown is made for analytical purposes only. As suggested in Section A, a court need not be concerned about the category into which the particular case falls, because the appropriate result is the same for all three: The court should admit the hearsay if it is more probative than prejudicial.<sup>53</sup> The basic reason for this result may be stated briefly. Assuming that neither party is better able than the other to produce the declarant and also that (as I have proposed), if she is produced, the evidentiary result is the same whichever party produces her, then the most sensible result is to pick the best presumptive evidentiary result. This imposes on the losing party the burden of altering that result if it appears worth his while to do so.

Subsection 4 discusses the different situation presented when the declarant is actually on the stand testifying. Finally, Subsection 5 discusses the application of the approach suggested here to hearsay statements created for litigation.

1. Production of the Declarant Impossible

In some cases, it may be impossible for either party to produce the declarant. The simplest case, of course, arises when the declarant is dead. Recall Hypothetical 3, in which Paul

---

53. As I have already argued, this is usually the case when the only substantial hurdle to admission of the evidence is its hearsay character. *See supra* pp. 737-43.



sought to introduce the declaration of a person who observed an accident and subsequently died. Because the declarant cannot be produced and the hearsay is, by hypothesis, cost-free to produce, cost considerations do not enter into play. As a matter of both fairness and efficiency, the question comes down simply to whether H is preferable to NE for truth determination—that is, whether the evidence is more probative than prejudicial. If, as I have argued above,<sup>54</sup> most often hearsay as to which there is no other ground for exclusion is more probative than prejudicial, then most often the court should admit a hearsay statement by a declarant who cannot be produced.

## 2. Production of the Declarant Feasible but Burdensome

Consider again Hypothetical 4, in which Paul offers the hearsay statement of a declarant who lives far from the courthouse, and whom either party could produce at trial but only at considerable expense. I will analyze this situation first under the assumption that, as I believe is usually the case, the hearsay is more probative than prejudicial. At the end of this subsection, I will analyze briefly the case in which this assumption is not true.<sup>55</sup>

Given the truth of this assumption, it is once again better, as a matter of both efficiency and fairness, to admit the hearsay. For one thing, the presumptive evidentiary result of the decision, H, is more satisfactory than is the alternative, NE: The assumption means that H is superior for truth determination, and, under the analysis presented in the last subsection, a fairer result as well.

But, because production of the declarant is feasible, the presumptive evidentiary result may not be the final one; the party losing the court's decision might decide to produce the declarant. Accordingly, we must consider the efficiency and fairness consequences of imposing the burden on either party.

As to efficiency, the court often cannot be sure whether or not producing the declarant would be an efficient result. The court can be confident, however, that a decision to ADMIT, which will impose on the opponent the burden of producing the declarant, is likely to lead to the more efficient result. Given the assumption that H is preferable to NE for determining the truth, the key question is whether LT is enough better than H

---

54. See *supra* pp. 737-43.

55. See *infra* note 61 and accompanying text.

to warrant the costs of production. The opponent is clearly the party better able to make that determination, because he is the one who would benefit from the production. Indeed, given H as the alternative, the opponent's interests are similar to the court's. The court should regard as a negative factor any costs the opponent incurs in producing the declarant, and as a positive factor any probative evidence helpful to the opponent that producing the declarant yields.<sup>56</sup>

Thus, if the opponent perceives that the likelihood that live testimony by the declarant would benefit his case is sufficient to warrant the cost of production, he will produce the declarant. Correspondingly, if he does not think that live testimony would be sufficiently better than the hearsay to make the costs worthwhile, he will not produce her.<sup>57</sup> As suggested in the previous discussion of Hypothetical 4,<sup>58</sup> the opponent might have made the hearsay objection even though from his point of view live testimony might appear barely better, or even worse, than simple admission of the hearsay. His true objective might have been to dissuade the proponent from offering any evidence at all from the declarant. Thus, imposing the burden on the opponent makes him put his money where his mouth is.

Now compare EXCLUDE as a possible ruling. The proponent may decide that the live testimony is not worth producing and resign himself to NE. This is exactly the result the opponent wishes, but ordinarily it is one that the court should regard as unsatisfactory because, by assumption, it is worse than H. The proponent may decide to produce the declarant, but fre-

---

56. The opponent's interests in deciding whether or not to produce the declarant do not exactly coincide with the court's. Producing the declarant might yield probative evidence helpful to the proponent, such as vivid details and a persuasive demeanor. The court would regard this positively, but the opponent would not. Thus, in some cases, the opponent might not produce the declarant even though the court would regard production as beneficial. The court need not worry about this, however, because the fact that the proponent has offered the hearsay shows that the benefits to him of producing the declarant are ones that he is willing to forgo, given the difficulty of producing the declarant. Given that the proponent is satisfied with H and prefers it to NE, the possibility that, putting aside the difficulty of production, he might prefer LT to H cannot be the reason to decide the hearsay issue against him.

57. Sometimes the opponent may be hampered in making this judgment by uncertainty regarding the reasons for the proponent's decision to offer the hearsay rather than produce the declarant—that is, whether the proponent merely wished to save cost and effort or whether he perceived that the live testimony would be less helpful to him than the hearsay. This difficulty is not usually enough to warrant a prophylactic rule excluding the hearsay. See *infra* note 82.

58. See *supra* pp. 748-50.

quently this will be wasteful. Often it will be true (though the court will have difficulty in knowing just when) that LT is far more satisfactory, costs of production aside, to the proponent than NE, and that, from the court's point of view, LT is only moderately more helpful to the truth-determining process than H. In Hypothetical 4, for example, Paul might decide that he simply cannot do without some evidence from Deborah showing that Theresa was very upset after the run-in with Otto. It may be, though, that there is only a small chance that live testimony by Deborah, subject to cross-examination, will yield substantially more useful information than would Deborah's hearsay statement. Paul will produce the declarant as long as the costs are no greater than the large gap that he perceives between LT and NE, but the result will be inefficient, as compared to H, if the costs are greater than the smaller gap that the court would perceive between LT and H. This situation will arise often. Frequently, as discussed earlier, an opponent in Otto's position will make the hearsay objection even though, costs of production aside, he perceives H as nearly as good an evidentiary result as LT, or even better.<sup>59</sup>

Thus, assuming that the hearsay is more probative than prejudicial, it is efficient to impose on the opponent the burden of producing the declarant. Considerations of fairness point in the same direction. Ordinarily, when a party offers evidence that the court deems more probative than prejudicial, the court admits the evidence, leaving it up to the other side to produce rebutting evidence. Even if the court is concerned that the primary evidence, if unrebutted, may mislead the jury, it often does not exclude the evidence. Rather, the court may decide that it is up to the opponent to produce any evidence he thinks will put the primary evidence in the proper light, just as any party ordinarily has a responsibility to present whatever evidence that he hopes will support his case. The court should follow the same principle in the hearsay context. The proponent, after all, has offered the evidence—the hearsay—that he finds satisfactory, and the court has, by hypothesis, found that this evidence does more good than harm. If the opponent truly believes that another type of evidence—in particular, the live testimony of the declarant—will be more to his advantage, then it is fair and proper for him to bear the burden of producing it.<sup>60</sup>

---

59. See *supra* pp. 748-49 (discussing Hypothetical 4 and the possibility that Otto may prefer H over LT).

60. The essence of this analysis can be generalized to whatever form of

Note how much easier it is to accept imposition of that bur-

evidence the opponent believes would be more acceptable proof than the hearsay statement of the proposition at issue. Suppose, for example, that the opponent believes that another observer could testify to the proposition asserted by the hearsay statement and that the alternative observer could be more readily produced as a witness than the declarant could. If the proponent nevertheless decides to offer the declarant's hearsay statement, and the court concludes both that the statement is more probative than prejudicial and that the proponent is not substantially better able than the opponent to produce either the declarant or the other observer, the court probably ought to rule ADMIT. The procedural proposals offered in Part III should also be extended, however; the opponent should be given the opportunity to produce *either* the declarant or the other observer before the court finally decides the admissibility of the hearsay. It may be that, given the live testimony of the other observer, the hearsay statement has insufficient probative value to warrant admissibility. One other related caveat is appropriate: If the proponent could easily produce the other observer but nevertheless decides to produce the hearsay, the court may have reason to suspect that the proponent made his choice because of weaknesses he perceives in the potential live testimony. This suspicion is essentially the same that may arise, whether or not there is another observer in the picture, from the proponent's decision to favor the hearsay over the declarant's own testimony.

Tentatively, I believe the analysis in the text also generally applies to evidence concerning foundation facts about the circumstances surrounding a statement that allow the trier of fact to assess the reliability of the statement. See Swift, *supra* note 5, at 1355-61 (suggesting a reformulation of hearsay law in which the proponent's introduction of evidence bearing on foundation facts would often be critical). Sometimes, of course, the proponent may *wish* to introduce evidence bearing on foundation facts—showing, for instance, that the declarant is an honest person who would have no interest in making the statement in question if it were not true. If the opponent challenges the declarant's credibility, such evidence would presumably be permissible, to the extent that it responds to the challenge. (If the opponent makes no such challenge, the evidence might be considered needless bolstering.) But, as long as there is a sufficient basis suggesting that the declarant (or each declarant in the chain, in the case of multiple hearsay) made her statement on the basis of personal observation, I do not believe the proponent presumptively ought to be *required*, as a precondition to admission of the hearsay, to introduce evidence bearing on foundation facts. As stated in the text, the proponent has offered the evidence that he is satisfied to offer, and the court has by hypothesis determined that it does more good than harm. Therefore, it appears to me that if the opponent desires that, assuming the hearsay is admitted, evidence be introduced that bears on the foundation facts and that presumably tends to impeach the declarant, then ordinarily the burden of producing such evidence ought to be imposed on the opponent. In some cases, the opponent might be satisfied to introduce hearsay evidence bearing on the foundation facts, in accordance with standards governing ordinary hearsay.

The burden might have to be adjusted if the proponent is substantially better able than the opponent to produce the foundation fact evidence that the opponent desires. In such a case, the court might impose on the opponent the financial burden of producing the foundation fact evidence and on the proponent the physical burden. (Note that Part V.C., *infra* at pp. 775-79, discusses a similar division of the burden, and other possible divisions as well, with respect to the hearsay evidence itself.) Under such a ruling, *if* the opponent ex-

den on the opponent given the procedural modification I have proposed, in which LT rather than LT\* is the usual evidentiary result even if the opponent is the one producing the declarant. This modification means that imposing the burden on the opponent has no adverse consequences for the quality of examination he may make if the declarant does testify.

If, contrary to the assumption made in the discussion above, NE is preferable to H for truth-determination, then efficiency considerations favor choosing NE in the first instance, leaving it to the proponent to decide whether production of the declarant is worthwhile. And fairness considerations point in the same direction as efficiency, albeit perhaps less strongly than when the hearsay appears more probative than prejudicial. The proponent should bear the burden of producing the declarant, and if she is not present, the hearsay ought not be admitted.<sup>61</sup>

### 3. Production of the Declarant Feasible Without a Substantial Burden

*Hypothetical 5: Propco offers against Oppco a memorandum written five years earlier by one of its officers, Della Declarant. The memo records the terms of a fairly simple transaction that Della had just completed over the phone with an officer of Oppco. The transaction has a peripheral bearing on the litigation, and Propco is offering the memo to prove that the terms of the deal were as recorded by Della. Della's office is located one mile away from the courthouse; either*

---

pressed willingness to pay for production of the foundation fact evidence, the proponent would be obligated, subject to a sanction, to produce the evidence. A powerful sanction for the proponent's failure to produce would be exclusion of his hearsay. No more powerful sanction would ordinarily be needed, because exclusion generally gives the opponent all he could want in opposing admissibility of the hearsay. Exclusion might not be necessary, however. It may be a sufficient sanction to instruct the jury that it should draw an adverse inference from the failure to produce; this might be particularly effective if the opponent also introduces impeaching hearsay evidence bearing on the foundation facts.

61. This conclusion might be less strong because of the point made earlier that admitting rebutting evidence, rather than excluding primary evidence, is usually the preferred remedy when unrebutted primary evidence appears unduly prejudicial. At least when the superiority of NE to H for truth determination appears doubtful, the court might take the view, if it is confident that the opponent could produce the declarant, that the proponent ought to be allowed to introduce his preferred form of testimony, with the opponent retaining the ability to correct its prejudicial impact. Nevertheless, it seems to me on balance that the opponent should not have to bear a significant burden to clear up evidence that is so defective that the court regards it as more prejudicial than probative.

*party could produce her as a witness without significant difficulty. Oppco objects to admission of the memo.*

The easier the burden is for both parties, the lower are the stakes of the hearsay decision. If the court chooses EXCLUDE and Propco is dissatisfied, it can produce Della. Similarly, if the court chooses ADMIT and Oppco is dissatisfied, it can produce her. Assuming that, as I have proposed, the court implements LT whichever party produces the declarant, the court's decision would not affect even the procedure for examining Della if, in fact, she is produced.

Though the stakes are lower, the analysis of Subsection 2 prevails. If the evidence appears to be more probative than prejudicial, it is both more efficient and fairer to select ADMIT, letting the opponent decide whether or not the value of live testimony is sufficient to warrant whatever burden production of the declarant would require. If he does not produce her, the court will admit the hearsay. If he does produce her, however, the proponent must put the declarant on the stand or forgo use of the hearsay.

The polar case of an easy-to-produce declarant is one who is already in the courtroom.

*Hypothetical 6: Same facts as Hypothetical 5, except that Della is actually in the courtroom. Propco had not been planning to call her as a witness, however.*

In this case, producing the declarant is essentially effortless. Therefore, assuming as before that the court would implement the LT procedure even after selecting ADMIT, the court's ruling on the hearsay objection has no impact. If the court selects EXCLUDE, Propco would then be put in the position of having to decide whether to put Della on the stand or to do without evidence from her altogether. If the court selects ADMIT, Propco would be put in the exact same position: Oppco would be able to put Propco to that choice without cost to itself, because it can produce Della without effort, and clearly Oppco wants to put Propco to the choice, for if it did not it would not have made the objection in the first place. In other words, the key decisions in resolving this situation are first the opponent's, in deciding whether or not to object, and then the proponent's, in deciding whether to put the declarant on the stand or to do without evidence from her. The court really has nothing to do with the result; the stakes of the court's ruling are zero.

#### 4. The Declarant Already Testifying

In characterizing the declarant already in the courtroom as

the polar case of a declarant who is easy to produce, I have treated separately the declarant who is already on the stand. That case, as the following hypothetical will help show, presents a different type of situation.

Hypothetical 7: *Same facts as Hypothetical 5, except that Della is actually testifying for Propco. This might have occurred because*

- (a) *Propco decided on its own initiative to produce Della,*
- (b) *Propco offered the memo, Oppco objected, the court sustained the objection, and Propco decided to produce Della, or*
- (c) *Propco offered the memo, Oppco objected, the court overruled the objection, but Oppco timely produced Della, and (pursuant to the LT procedure), Propco decided to put Della on the stand rather than forgo use of any evidence from her.*

*Without asking Della about the event that was the subject of the memo, Propco seeks to introduce the memo through her. Oppco objects.*

Given that Della is already on the stand and testifying, there is no remaining burden in seeking her testimony. The only burden that was, or might have been, imposed on Oppco—to produce her so that Propco could put her on the stand and examine her—has been satisfied. Demanding that Propco procure Della's live testimony only requires that Propco ask the questions.<sup>62</sup>

The question here, therefore, is not how to allocate the burden of producing the declarant, as it is when the proponent wishes to introduce evidence of a hearsay statement by a declarant who is absent, yet could be produced. Rather, the first issue is a procedural one. As noted in Part III, the better procedure is first to require the proponent to ask the witness for her current testimony of the underlying event or condition.<sup>63</sup> This procedure helps prevent the proponent from hiding behind the hearsay statement when the live testimony may not be as favorable to him. It also ensures that the ultimate ruling on admissibility of the hearsay can be made optimally, in light of the declarant's testimony. Thus, the court's best response to Oppco's hearsay objection in Hypothetical 7 would be to say something like this to Propco's counsel: "Your adversary is right. First let's find out what she can testify to from memory."

But while this procedural ruling delays, it does not avoid,

---

62. It is possible in some circumstances that, although Della is on the stand, the full burden of producing her has not yet been satisfied because she has a privilege that she intends to assert. I am using "on the stand" as a shorthand for "on the stand, ready, willing, and able to testify."

63. For a fuller statement of the considerations supporting this procedure, see Friedman, *supra* note 9, at 900-04.

the need to rule on the ultimate question—admissibility of the hearsay statement. Once the court is satisfied that the proponent has drawn out of the declarant the testimony she is now willing and able to give, it should then determine whether admitting the hearsay statement will, on balance, help or hinder the truth-determining process.

If the declarant claims to have no memory of the underlying event or condition, then the situation is much as if she were dead or otherwise totally unavailable, as in Subsection 1. In most cases, the hearsay will presumably be more probative than prejudicial, and so should be admitted.

At the other extreme, suppose the declarant professes to have a perfect memory of the subject, and the hearsay statement is perfectly in accord with her testimony. The court might decide, depending on the circumstances, that the statement is a virtually useless, time-wasting attempt to bolster her testimony, and so should be excluded.<sup>64</sup>

Of course, there are other possibilities as well. If the hearsay statement is consistent with, but more detailed than, the current testimony, the court might decide that it has enough incremental probative value to warrant admissibility. The court might reach the same result if the statement is inconsistent with the current testimony. If the statement would have been admissible had the declarant not testified, ordinarily it has no less probative value simply because the declarant testifies inconsistently with it.<sup>65</sup>

---

64. This would not be true if the hearsay statement was made before the time of an alleged failure in a testimonial capacity that, according to the opponent, accounts for the declarant's live testimony; for example, if the opponent contends that the declarant's testimony is explained by the fact that one year before trial the opponent fired her, this contention is undercut by proof of a statement consistent with the testimony and made two years before trial. *See* FED. R. EVID. 801(d)(1)(B) (providing that a prior statement by a witness who is subject to cross-examination at trial is not hearsay if the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive").

65. The statement would, in any event, be admissible for impeachment; the hearsay question is whether the statement should be admitted for the truth of the matter it asserts. Under Federal Rule of Evidence 801(d)(1)(A), a prior inconsistent statement is exempted from the hearsay rule only if it "was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." Other jurisdictions, however, differ widely in their treatment of this issue.



## 5. Hearsay Statements Created for the Purpose of Litigation

The relatively hospitable attitude toward hearsay suggested here might encourage parties, in advance of trial, to prepare statements for adoption by cooperative declarants. The parties might then offer the statements instead of live testimony by the declarants, or in addition to the testimony when the testimony turns out not to be as favorable as the hearsay. To some extent, this seems to raise the possibility of trial by affidavit. For several reasons, though, I do not believe that this prospect is usually troublesome.<sup>66</sup>

First, recall again that the approach suggested here is not meant to be applied when a criminal defendant's confrontation rights are at stake.<sup>67</sup> In that context, the possibility of the prosecution protecting against a turncoat witness by preparing an affidavit that could be used to convict the defendant, no matter what the witness' testimony, should indeed be considered intolerable. But that is not the subject of this Article.

Second, outside the confrontation context, trial by affidavit may be a good thing to some extent. True enough, affidavits are often an inferior form of evidence, not only to live testimony but to other types of hearsay as well. Production of live evidence is often expensive, however, even where it is feasible, and the proponent does not always have the good fortune that the potential witness happens to have made a hearsay statement in provable form. Most often it is the proponent, not the opponent, who, cost considerations aside, would prefer the live testimony of the declarant to her affidavit. Much can be said for allowing the proponent to offer the type of evidence that he finds most cost-effective, so long as that evidence is more probative than prejudicial. Moreover, in some respects an affidavit, taken alone, is actually superior, even from the court's point of view, to the declarant's current testimony, taken alone. Affidavits are efficient to present in court, they may reflect a fresher memory than trial testimony, and they often reflect greater care and precision than the oral testimony of a nervous witness on the stand responding immediately to questions

---

66. I have addressed a related problem that might be thought to arise, see Friedman, *supra* note 9, at 898 n.27—the prospect that the proponent would attempt to shift costs to the opponent by declining to produce the declarant in the anticipation that the opponent will bear the costs of doing so. See Ronald J. Allen, *The Evolution of the Hearsay Rule to a Rule of Admission*, 76 MINN. L. REV. 797, 808-09 (1992). For reasons explained in the prior article, I do not believe that this prospect is very worrisome either.

67. See *supra* notes 8-10 and accompanying text.

posed orally. The ideal result, time and cost considerations aside, would often be presentation of the live testimony *and* the affidavit—but sometimes that result will not be efficient.

Third, to the extent that affidavits are inferior to live testimony, the opponent usually has effective remedies. At the very least, the opponent can point out the non-adversarial setting in which the affidavit was made. There seems to be no particular reason why the jury would be unable to appreciate this factor. When production of the declarant is feasible, the opponent can, as with other forms of hearsay, produce her if he really thinks the defects of the affidavit are sufficiently important to make production worthwhile. As this Section has argued, it is both efficient and fair that the opponent have the burden of producing the declarant, assuming that he is not substantially less able than the proponent to do so and that the statement is more probative than prejudicial. And if the declarant is on the stand but retreats behind the affidavit, perhaps claiming an inability to remember the underlying facts, this testimony will often provide the opponent with excellent impeachment material.

Finally, there is a short answer to the argument that the theory presented here would allow a corrosive form of evidence: If the court concludes in the particular case that the evidence is really more prejudicial than probative, the theory should *not* allow the evidence. Circumstances of the given case might, for example, arouse the court's concern that in fact the proponent's counsel prepared the statement because she could make it favorable to her side but feared the effects of live testimony in a setting not totally under her control. Sometimes, then, the court's skepticism about a statement prepared for litigation might be sufficient to exclude the evidence. This possibility does not, however, warrant a broad rule of exclusion.

#### C. SELECTING A RULING WHEN ONE PARTY HAS A SUBSTANTIAL ADVANTAGE IN PRODUCING THE DECLARANT

Section B assumed that it is not substantially easier for one party than for the other to produce the declarant. But this is not always the case. For any of various reasons, some of which will be suggested in this discussion, one party might be better able to perform one or more of the tasks necessary to produce the declarant. Indeed, in some cases only one party could produce the declarant at all.

When the hearsay is more probative than prejudicial, as is

usually the case, and the opponent has the production advantage, the solution is easy. Under the analysis of Section B, when the parties have substantially equal ability to produce the declarant, the better ruling is ADMIT, imposing on the opponent the burden of producing the declarant. This ruling is *a fortiori* the better one if the opponent has a substantial advantage over the proponent in producing the declarant. Correspondingly, when the hearsay is more prejudicial than probative, and the proponent is better able to produce the declarant, EXCLUDE is clearly the better ruling, more strongly than when the parties are equally able to produce her.

The more difficult, and interesting, cases arise when the factors cut in opposite directions. Subsection 1 will concentrate on what I believe is the more common, and so more important, of these situations—the situation in which the hearsay is more probative than prejudicial, but the proponent has a substantial advantage in producing the declarant. Subsection 2 will briefly address the reverse situation.

1. When the Hearsay Is More Probative Than Prejudicial,  
and the Proponent Possesses a Substantial  
Production Advantage

Section B has shown that, if the hearsay is more probative than prejudicial and neither party has a substantial advantage in producing the declarant, then both efficiency and fairness call for requiring the opponent to decide whether producing the declarant is worth the cost and to bear that cost if the proponent is in fact produced. The arguments underlying this conclusion retain some force even when the proponent is substantially better able than the opponent to produce the declarant. H is still, by hypothesis, a better presumptive evidentiary result than NE, and it is still the opponent who wants to alter that result. But if the proponent's advantage in producing the declarant is sufficiently pronounced, and especially if only the proponent can produce her at all, then powerful countervailing considerations of fairness and efficiency may favor imposing the physical burden on the proponent. If the opponent would substantially prefer live testimony to hearsay, then it is both unfair and inefficient for him to have to forgo the opportunity to examine the declarant because he cannot produce her feasibly though the proponent could do so easily. And if the declarant is to be produced, putting the opponent to great trouble

and expense seems clearly less fair and efficient than having the lower-cost party do the work.

How should the court resolve these competing considerations? Ideally, the court would select a ruling that achieves two aims. First, the ideal ruling minimizes costs because, if the declarant is to be produced, the proponent performs that portion of the work that he can do most easily. Second, the ideal ruling maintains the proper incentive structure (given that the evidence is net probative), because the opponent decides whether it is worthwhile to produce the declarant and bears the (minimized) cost of doing so.

Sometimes, but not always, the court might be able to achieve, or approach, this ideal result. Any of various solutions might be reasonable, depending on the circumstances of the particular case. Much of the discussion below will focus on the following hypotheticals and variations on them.

*Hypothetical 8: Propco makes known three weeks before trial its intention to offer a hearsay statement by Dina Declarant, one of its sales representatives. Dina spends most of her time in other states, but she virtually always spends at least one night every two weeks at her apartment in Courthouse City. Oppco does not know her schedule, but it could, with some difficulty, track her down and subpoena her. Propco, on the other hand, could simply call her on her car phone at any time and tell her to come immediately to trial. The court is satisfied that the statement is more probative than prejudicial.*

*Hypothetical 9: Propco wants to introduce a memo written five years ago by a person not identified on the face of the memo. The author is presumably no longer with Propco, because three years ago Propco closed the office from which the memo was written. By checking a coded notation on the memo against a list in its files, Propco could easily determine the name of the declarant and her address as of the time she left Propco's employ. Oppco has no feasible means of identifying the declarant. The court believes the memo is more probative than prejudicial.*

*Hypothetical 10: In his litigation against Otto, Paul wants to introduce a statement made a year before by a casual acquaintance of his, Dorothy Declarant. Paul has lost touch with Dorothy, but they have mutual friends. Otto has no idea where Dorothy lives. The court believes that the statement is more probative than prejudicial.*

*Hypothetical 11: Paul wants to introduce the hearsay statement of his sister, Denise. She is in Eastern Europe, beyond the subpoena power. The court believes that her statement is more probative than prejudicial. It also believes that, if it is important to Paul that Denise testify, he could persuade her to do so, so long as her expenses are paid. Otto, however, could not compel her to testify.*

Hypothetical 12: *Albert Acker is the accused in a felony case. The prosecution wants to introduce evidence of the out-of-court statement of Diana Declarant, a former collaborator of Acker's. The court is able to satisfy itself that the statement is not excluded by Acker's rights under the Confrontation Clause. The court also believes that the statement is more probative than prejudicial. Diana lives in a distant state, but either party would be able to secure her presence pursuant to the "Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings." The problem is that Diana has made clear, through counsel, that if called to testify she would claim her Fifth Amendment privilege against self-incrimination. There is, in fact, a theoretical possibility that Diana could be prosecuted and that the prosecution would use her statement against her. It is highly unlikely, however, that she will be prosecuted, because her involvement in the criminal enterprise was tangential at best, and, in any event, the statement is at most mildly inculpatory of her.*

These hypotheticals reflect a variety of advantages that one party might have over the other in producing the declarant—an advantage in information, as in Hypotheticals 8 and 9, or in access to information, as in Hypothetical 10; an advantage in ability to persuade the declarant to appear without waiting for a subpoena, as in Hypothetical 8, or even though she is beyond the subpoena power, as in Hypothetical 11; and an advantage in extinguishing a privilege, as in Hypothetical 12. Other advantages are also possible.<sup>68</sup> In particular, it may be that, although the cost and effort of producing the declarant would be the same for both parties, one party is substantially more able than the other to bear those costs. I do not present any hypotheticals involving disparate ability to pay because I believe only very tentatively that it is an appropriate factor for the court to take into account.<sup>69</sup>

---

68. One party may, for example, have superior access to necessary means of transportation. See Friedman, *supra* note 9, at 919-20. The proponent may also have a significant advantage if he does not give sufficient notice of his own intention to offer the hearsay (which implies a possibility that, if the hearsay is excluded, he will produce the declarant). The problem of late notice is addressed separately. See *infra* pp. 783-91.

69. I have already addressed the question of whether ability to pay ought to be taken into account for distributional reasons. See *supra* part IV.B.3. There is a separate question of whether it ought to be taken into account for efficiency purposes. Suppose, for example, that the court is convinced of the following: H is somewhat better than NE for truth determination, but LT would be substantially better than either; if the presumptive evidentiary result were NE, the proponent would find it easily worthwhile to produce the declarant; but if the presumptive result were H, the opponent would find production too expensive. The court thus might be tempted to choose EXCLUDE rather than ADMIT, inducing the proponent to produce the declarant. The proponent is likely to object that H is really nearly as good a result as LT, and perhaps

The following pages examine in turn each of several possible rulings, suggesting circumstances in which each might be appropriate.

a. *Admitting the Hearsay*

In Hypothetical 8, Propco has an advantage, perhaps substantial, in producing the declarant. Nevertheless, the court might still select ADMIT, as it ought to do if neither party had such an advantage. True, it would cost Oppco more to produce Dina than it would cost Propco, but at least two factors still favor imposing the burden on Oppco. First, given that the evidence is more probative than prejudicial, Oppco is the party that should bear the costs of producing Dina. Second, it may be that Oppco would choose not to produce her even if its costs of doing so were as low as Propco's. If so, imposing the burden on Propco because of its advantage in producing the declarant would needlessly cause it either to produce her or to forgo evidence from her.

Beyond that, it is plausible that, even if the court selects ADMIT, Propco would agree with Oppco to produce Dina. Perhaps this seems strange at first. Propco, after all, offered the hearsay rather than Dina's live testimony, and the court's rul-

---

even better from the opponent's point of view, so that even if there were no disparity in ability to pay, the opponent would not be inclined to produce the declarant. Thus, the proponent will argue, the court has chosen an inferior presumptive result, NE, and forced him to remedy it at unnecessary expense.

A possible resolution is that the court ought to take the proponent's superior ability to pay into account only if it is confident that: first, the disparity is substantial; second, H is not substantially superior to NE for truth determination; and third, LT is so substantially superior to H for truth determination that, if the opponent had the proponent's ability to pay, the opponent would produce the declarant if the evidentiary result otherwise would be H. In addition, the court might consider splitting the financial burden—for example, by imposing on the opponent that portion of the cost that would entail the same welfare loss to the opponent as if he had the proponent's ability to pay and bore the entire cost of producing the declarant. This would be a form of the SPLIT BURDEN solution. See *infra* pp. 770-75. (Note that some other possible responses discussed in this section to a production advantage held by the proponent—selecting ADMIT and leaving it to the parties to negotiate a deal under which the opponent would compensate the proponent for producing the declarant, or imposing the physical burden of production on the proponent and the financial burden on the opponent—do not make sense when the proponent's advantage is in ability to pay.)

Thus far I have spoken of ability to pay, but it may be that, so far as efficiency is concerned, the precise question, or at least another question, is *inclination* to pay for a given benefit in litigation. That is, a party's litigation budget might be a more useful datum than his net worth, because it gives a better indication of whether he would find a given expense worthwhile.

ing of ADMIT supports its right to do so. Nevertheless, Oppco may be willing to make producing the declarant worth Propco's while. Given that Propco could produce her more cheaply than Oppco could, there is room for a deal between the parties, particularly if Propco is persuaded that, absent a deal, Oppco would produce her anyway. For example, Oppco's counsel might say to Propco's:

Well, congratulations on beating my motion to exclude. But I can't let Dina's statement in without examining her. I'll stake out her apartment in town if I have to, but you're not really going to litigate like that, are you? Listen, if you promise to bring her in, I'll \_\_\_\_\_."

The blank might be filled in with various types of consideration—perhaps an amount of money at least as great as Propco's cost of producing the declarant, perhaps some benefit in the litigation, such as reciprocal cooperation by the opponent. The effective result of such a deal would be that Propco bears the physical burden of producing the declarant, and Oppco, in one coin or another, bears the financial burden, plus perhaps a premium to induce Propco's cooperation.

For several reasons, transaction costs may be low enough to make this sort of deal feasible. There are only two parties,<sup>70</sup> and they are already in contact with each other. Moreover, their counsel have recurrent dealings, perhaps from one litigation to another,<sup>71</sup> but, more importantly, within the same litigation. Cases last for some time, usually presenting numerous side issues subject to negotiation. Indeed, there may be many items of hearsay, offered by both sides, as to which the parties might resolve questions of admissibility and production of declarants by negotiation. Litigators learn that life is much easier if they can deal with their adversaries. Professional etiquette might also, even apart from any considerations of self-interest, encourage lawyers to be accommodating.

One advantage of this type of voluntary transaction between the parties is that they will enter into it only if it makes sense, and it will make sense only if the proponent's costs of production appear likely to be substantially lower than the opponent's. Thus, if the hearsay appears more probative than prejudicial, and transaction costs appear to be low, the court may find it best to select ADMIT, without worrying very much,

---

70. That is a hypothesis of this model. *See supra* p. 727. Sometimes, of course, there will be more parties, but they will always be known to each other.

71. Though rarer than in earlier times, such recurrent contact may still be important in relatively small cities and in specialized areas of practice.

at least up to a point, as to whether the proponent is substantially better able than the opponent to produce the declarant. If, in fact, it appears to the parties that the opponent can produce the declarant as or more cheaply than the proponent can, the deal will not be made. And if the parties believe that the proponent can produce the declarant much more cheaply, and the opponent would like to produce her at that cost, then the parties would likely agree between themselves to shift the physical burden. When transaction costs are low, therefore, the court can have confidence that the declarant will be produced, if at all, in the most efficient way. The court may not need to worry very much which party would produce her.

For three reasons, however, the court might sometimes hesitate to adopt this solution. First, the proponent may be unwilling to deal at all, at least at a price that the opponent would be willing to pay. This is especially possible if (as in *Hypotheticals* 9 through 12) it is not feasible for the opponent to produce the declarant. Under that hypothesis, a deal would not simply change the identity of the party producing the declarant. Rather, it would cause a different evidentiary result—LT instead of H. In some cases, the proponent, satisfied with H but fearful of what LT might bring, may be unwilling—at least for a price substantially less valuable than victory in the litigation—to achieve the latter result instead of the former. Thus, there may be no deal, even if the opponent would be glad to cause the declarant's production if all he had to pay was the proponent's costs and perhaps even a modest premium. The court might be inclined to select ADMIT only if it perceives that the opponent—albeit perhaps indirectly, and at a somewhat elevated cost, as the result of a deal—is essentially as able as the proponent to cause the production of the declarant. If a deal is not a practical possibility, this premise might not hold.

Second, if the parties make a deal, the proponent might extract from the opponent a large premium over the proponent's production costs. The greater the proponent's production advantage is, and the more each party thinks the declarant's live testimony would benefit the opponent of the hearsay, given that the alternative is admission of the hearsay, the larger the premium will tend to be. The court might not appreciate the proponent's use of the ADMIT ruling as the occasion for exercising a sort of monopoly power, making a profit at the expense of the opponent.<sup>72</sup>

---

72. In some cases, though, the proponent might argue with some reason



Third, in some cases, transaction costs may be quite high. The hostility between the parties may be so great that it is difficult to have efficient negotiations on the substance of the litigation, much less on side issues. Moreover, just the lawyers' time necessary to negotiate whether the proponent will bring the declarant to court, and the consideration that the proponent will receive for doing so, may not be worthwhile.

In some cases, therefore, even though the proponent is far better able than the opponent to produce the declarant, the court might decide that it should not depend on the prospect that the parties will make a deal shifting the physical burden to the proponent. In such a case, the court might conclude that the simple ADMIT ruling is not appealing (even though the hearsay is more probative than prejudicial) and therefore might impose on the proponent at least part of the burden of producing the declarant. In my earlier article, I have suggested that there are various ways the court might split that burden.<sup>73</sup> The best way to do this depends on the precise circumstances.

#### b. *Dividing the Physical Burden*

In some cases, it makes sense to give the proponent the burden of performing part of the set of tasks necessary to produce the declarant. This type of ruling may be labeled SPLIT BURDEN.

Hypothetical 9, involving a statement by an unknown for-

---

that any premium that the deal earned for him over his costs of production was simply the result of different perceptions of the situation by the two parties. If, excluding the possibility of a deal, the opponent's next best, or only, alternative given ADMIT is DO NOTHING, then the declarant will be produced only if the parties make a deal. In those circumstances, they will make a deal only if they perceive the situation in contradictory ways: First, the opponent must perceive that LT would be sufficiently more favorable to his litigation position than H to warrant the payment; second, the proponent must perceive either that LT is better than H for *his* litigation position, or that if it is worse the sacrifice is small enough to be worthwhile in light of the premium (i.e., the payment less his costs of producing the declarant). In this situation, the proponent arguably ought to be allowed to keep the benefit of his bargain; if, in fact, LT is far worse for him than H, he will pay the consequences of misperception.

If, on the other hand, the opponent's next best alternative was PRODUCE, then the declarant will be produced whether or not the parties make a deal. If they do make a deal, the proponent gives up nothing, and simply makes a profit by selling witness-production services more cheaply than the opponent could himself produce the declarant. The deal might be mutually advantageous, given that the burden of producing the declarant has been imposed on the opponent. Fairness and efficiency, however, weigh in favor only of imposing the actual burden on the opponent—not the burden plus a premium.

73. See Friedman, *supra* note 9, at 904-16.

mer employee of Propco, is an example of a case in which a rather simple SPLIT BURDEN solution seems available. The court should impose on Propco the burden of identifying the declarant and of locating her to the extent of determining her address as of the time she left Propco; the remainder of the burden should be imposed on Oppco. In other words, if Propco declines to provide Oppco with the declarant's name and last known address, the court excludes the hearsay. If Propco does provide the information to Oppco, the court admits the hearsay unless Oppco finishes the job of producing the declarant.

In Hypothetical 10, involving a statement by an acquaintance of Paul's whom Otto could not feasibly locate, a simple solution also appears available. The court probably should impose on Paul the burden of locating Dorothy, and on Otto the remaining aspects of the burden of producing her. If Paul does not provide Otto with Dorothy's current address, the court should exclude the hearsay. If he does, the court should admit the hearsay unless Otto produces Dorothy.

Note that in each of these cases, the suggested solution is to impose on the proponent only those aspects of the burden as to which it has a substantial advantage over the opponent. In Hypothetical 9, Propco can far more easily determine the declarant's identity and her past address. Given that information, Oppco appears to be in as good a position as Propco to produce the declarant. In Hypothetical 10, on the other hand, given that Paul and Dorothy have mutual friends, it is presumably much easier for him than for Otto to track her down.

In Hypotheticals 9 and 10, the proponent has an advantage in information. Sometimes the proponent might have another type of advantage that would warrant dividing the physical burden. Thus, in Hypothetical 11, Paul has an advantage in that he could persuade his sister Denise to testify, but Otto could not. The court might impose on Paul the burden of persuading Denise to testify, and on Otto the remaining aspects of the burden of producing her as a witness. For example, the court might rule that it will admit the hearsay unless Otto commits himself to arranging, and paying, for Denise's transportation, assuming she is willing to appear. Thus, Otto would have to decide whether or not it was worthwhile to go to the trouble and expense of ensuring her appearance, assuming her willingness to appear. If Otto decides in the affirmative, then Paul must decide whether or not to persuade Denise to appear. If he de-

clines to persuade her, the hearsay would be excluded.<sup>74</sup>

Hypothetical 12, involving a statement by a person who could claim a Fifth Amendment privilege, presents another situation in which only the proponent, here a criminal prosecutor, could induce the declarant to testify. The prosecutor could accomplish this most simply by granting her use immunity, assuming the law of the jurisdiction will allow it. But the hearsay is more probative than prejudicial. The court therefore might impose on the prosecution the burden of nullifying the Fifth Amendment problem and on the opponent, Acker, the remaining aspects of the burden of producing the declarant, Diana. This might be done in various ways. For example, the court might rule that it will exclude the hearsay unless the prosecution commits to granting Diana use immunity (or otherwise removing the Fifth Amendment problem, as by a plea bargain) if she is brought to court; if the prosecution does make that commitment, the hearsay would be admitted unless Acker produces Diana in court.

Figure 4 represents in general terms the type of ruling discussed above, which I call SPLIT BURDEN (PROPONENT FIRST). As this diagram indicates, the declarant testifies live if and only if each party performs its designated part of the burden, indicated by PART-PRODUCE, and bears the attendant costs (indicated by the subscripts  $p'$  and  $o'$ , read, respectively "p-prime" and "o-prime"). Under this variation of SPLIT BURDEN, the proponent is required to commit first as to whether it will perform its designated share of the burden; if it chooses DO NOTHING, the hearsay is excluded, without the opponent having to make any commitment. Other variations of SPLIT BURDEN are possible. Figure 5, for example, which in a sense is a mirror image of Figure 4, represents SPLIT BURDEN (OPPONENT FIRST). Under this version, the opponent is required to commit first, and if it chooses DO NOTHING, the hearsay is admitted without the proponent having to commit.<sup>75</sup> Which variation of SPLIT BURDEN is preferable depends on an assessment

---

74. There is actually a variety of ways in which the court might achieve the same division of the burden. See *infra* notes 75-77 and accompanying text.

75. Note that both Figures 4 and 5 indicate costs of zero if the first party chooses PART-PRODUCE but the second chooses DO NOTHING. These diagrams are drawn on the assumption that, though the first party must commit before the second party, the first party does not actually have to perform its share of the burden until after the second party commits. Thus, if the second party chooses DO NOTHING, there is no cost. See *infra* note 76.

of the precise circumstances of the case.<sup>76</sup>

Whichever variation of SPLIT BURDEN the court selects, by

---

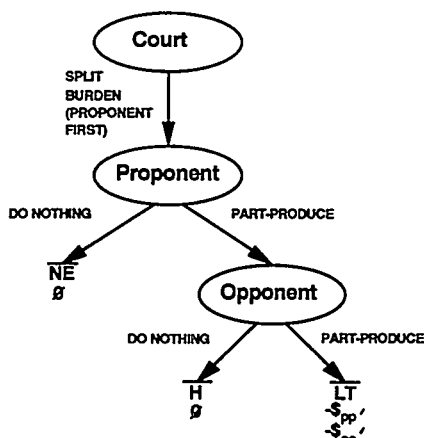
76. Consider Hypothetical 12 again. In this case, either party could be called on to perform its portion of the burden (or suffer an adverse evidentiary result), before the other is called on to perform his share of the burden. That is, the prosecutor could be called on to grant use immunity to the declarant either before or after the accused brings her to court. Most often, though, where there is no doubt that if the declarant were in court she would have to testify, the respective portions of the burden have to be performed in a natural chronological order—the declarant must be identified before she can be located and must be located before she can be brought to court.

Whether or not there is flexibility as to the sequence in which the parties can be called on to *perform* their portions of the burden, there is flexibility as to the sequence in which they may be called on to *commit* as to whether they will perform. In this hypothetical, for example, it makes no sense for Acker to produce Diana in court, which might be an expensive process, unless the prosecution has at least committed to nullifying the Fifth Amendment problem. And it probably makes no sense for the prosecution to go to the trouble of nullifying that problem unless Acker has committed that, if the problem is or will be removed, he will commit to produce Diana in court. It seems, then, that to prevent wasted effort, each side should be called on to commit to whether it will perform its share of the burden before the other side is called on to perform its share.

The question then becomes the sequence in which the parties should be required to state their commitments. This question is important not only to save wasted effort but also because it might affect the ultimate evidentiary result. Whichever party is called on to commit second has an advantage: If the first party does not commit to performing its share of the burden, the second party gets the evidentiary result it desires, without ever having to commit. This asymmetry may be eliminated by effectively requiring the parties to commit simultaneously; the court might, for example, ask each party to submit a written statement of its intent. This type of ruling, which I call SPLIT BURDEN (SIMULTANEOUS MOVES), is discussed in Friedman, *supra* note 9, at 912-15. When the court wants to avoid going through this simultaneous commitment process, the following rule of thumb may be appropriate: If the hearsay is more probative than prejudicial, require the opponent to commit first (thus ensuring that if the opponent is unwilling or unable to perform his task the hearsay will be admitted), unless the task imposed on the proponent is essentially cost-free (in which case the proponent's refusal to perform is probably highly significant); correspondingly, if the hearsay is more prejudicial than probative, call on the proponent to commit first, unless the opponent's task is essentially cost-free. For a fuller discussion of this topic of sequencing, see Friedman, *supra* note 9, at 910-15.

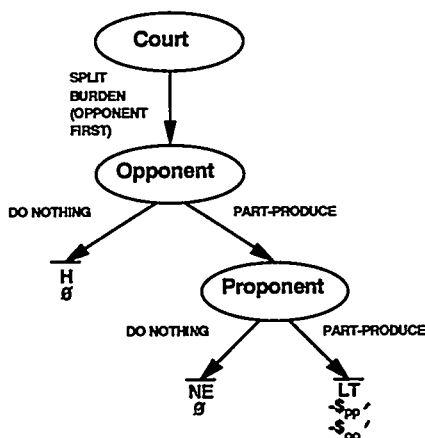
In Hypothetical 12, the evidence is assumed to be more probative than prejudicial. Thus, a decision requiring the prosecution to commit first would reflect a judgment that eliminating the Fifth Amendment problem would be essentially cost-free for the prosecution. (This is probably so given that it is not anticipated that Diana would be prosecuted; on the other hand, granting her use immunity now might create difficult hindrances in a later prosecution, because the prosecutor would have to show that he is not relying on the immunized statement. See *Braswell v. United States*, 487 U.S. 99 (1988).) If the court is in doubt on this score, the safest thing to do might be to require simultaneous commitments.

Figure 4



dividing the physical burden in cases such as Hypotheticals 9 through 12, the court is able to take advantage of the proponent's superior or exclusive ability to perform part of the set of

Figure 5



tasks necessary for producing the declarant. At the same time, because the tasks imposed on the proponent should not cost it any substantial amount of time or money, the division leaves virtually the entire financial burden where it belongs, given that the hearsay is more probative than prejudicial—on the opponent.

SPLIT BURDEN can have significant problems, however.

Sometimes it is inefficient for the burden to be broken down. In Hypothetical 8, for example, in which the proponent but not the opponent can easily locate a fast-moving declarant, it probably makes little sense to set up a procedure in which the proponent locates her and passes the information on to the opponent and the opponent then subpoenas her. Sometimes, if in the end the declarant is not produced, it might be unclear whose fault caused her absence. The court should be reluctant to have to adjudicate a squabble over who dropped this relay baton.

Furthermore, the portion of the burden imposed on the proponent might not be cost-free. Recall that for now we are assuming that the evidence is more probative than prejudicial. Thus, for goals of both fairness and efficiency, the court should impose the cost of producing the declarant on the opponent. These goals are undercut to the extent that the portion of the burden imposed on the proponent carries substantial cost, financial or otherwise. For example, if Hypothetical 12 is varied so that the prosecutor is seriously considering prosecuting Diana, he might have significant reasons not to grant her use immunity.

Finally, if the court is imposing part of the burden on the proponent simply because of the proponent's presumed advantage in carrying that portion of the burden, the court should take great care that the proponent really is able to perform that portion. In Hypothetical 11, for example, what happens if in fact Paul is not able to persuade his sister to appear? If he has tried in good faith, the court might prefer treating the case as one in which the declarant was simply unavailable, which would presumably lead to ADMIT. But the court will not wish to engage too often in adjudications of good faith.<sup>77</sup>

### c. *Separating the Physical and Financial Burdens*

In some cases, the courts might sensibly impose the entire physical burden on the proponent and the entire financial burden on the opponent. Consider the following hypothetical.

Hypothetical 13: *A variation on Hypothetical 9. Propco wants to introduce a memo written by an employee not identified on the face of the memo. The memo is an entry in a computerized record, and Propco can identify the author of the memo only after a search that will require a more than trivial amount of staff time and some high-priced computer time. Only Propco employees could conduct the search, at least without revealing proprietary information. Propco's*

---

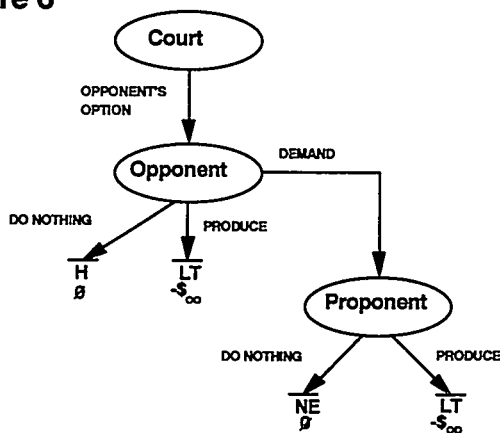
77. This difficulty is discussed at greater length in Friedman, *supra* note 9, at 914-15.

*sole office is located in Courthouse City, and the memo was written only one year before the time of the trial. Thus, once the author of the memo is identified, either party could presumably produce her as a witness without difficulty. The court is satisfied that the memo is more probative than prejudicial.*

In these circumstances, ADMIT is probably not an appealing choice for the court; Oppco could not produce the declarant itself, and, given that fact, Propco might be unwilling to agree with Oppco to produce her.

Nor does it seem wise to adopt a variation of SPLIT BURDEN—for example, by imposing on Propco the burden of identifying and locating the declarant, and on Oppco the remaining

**Figure 6**



portions of producing her. Identifying the declarant may be difficult and expensive. Because the hearsay statement appears more probative than prejudicial, the expense of producing the declarant should not be incurred unless Oppco is willing to bear it. Propco should not be the one bearing that expense.

Thus, in this case, the best ruling might be to impose on Oppco the entire financial burden of producing the declarant and on Propco the entire physical burden of producing her. Figure 6 represents this allocation, which may be called OPPONENT'S OPTION, in general terms. (The reverse allocation, PROPONENT'S OPTION, is not pictured here.) OPPONENT'S OPTION would most sensibly be implemented in this case as follows:<sup>78</sup> The hearsay would be admitted unless Oppco de-

78. In other cases, other sequences might be preferable. See *supra* note 76

cided to DEMAND production, committing itself to paying Propco's costs of producing the declarant. If Oppco did commit itself to doing that, then the hearsay would be excluded unless Propco produced her. And if Propco did produce her, Oppco then would have to pay Propco its costs, a payment indicated by the notation  $-\$_{op}$ . The court would determine the amount of the payment if the parties were unable to agree.

This OPPONENT'S OPTION ruling assures that the opponent will bear the costs of producing the declarant. At the same time, the ruling gives the opponent the benefit of the proponent's production advantage—without the necessity of having to pay a premium for it and without having to negotiate for it.

This does not mean that negotiations have no role under OPPONENT'S OPTION. Because the opponent has the right to demand production by the proponent, all that must be determined is the compensation. And given that the court will set the compensation absent agreement by the parties, the parties may be able to negotiate efficiently a reasonable compensation.

Sometimes, though, negotiations will break down, and the court will have to determine the compensation. It might not be able to do this accurately. For example, if the court determines the compensation before the proponent actually produces the declarant, events might not bear out its prediction. If the court waits until after the fact to determine the compensation, the proponent will have no incentive to act efficiently, because he will in effect be spending his opponent's money. Accordingly, OPPONENT'S OPTION should not be used indiscriminately. Courts should use it only when they think that the proponent has a large enough production advantage to make the administrative costs and uncertainties worthwhile.<sup>79</sup>

---

(discussing the problem of sequencing of commitments); *infra* notes 82-83 and accompanying text (discussing a possible requirement that proponent commit first when motives are suspect). Note that, although the opponent in Hypothetical 13 cannot produce the declarant by itself, Figure 6, being drawn generally, does indicate this possibility.

79. By now, some readers might recognize a familial resemblance between the analysis here and that in Calabresi & Melamed, *supra* note 44. The decision to impose the financial burden on the opponent might be considered an initial entitlement for the proponent to have the hearsay admitted without his having to produce the declarant. The entitlement might be protected by a property rule or by a liability rule.

A property rule would mean that if the opponent wants to remove the entitlement from the proponent, he must enter into a voluntary transaction with the seller; this is ADMIT, allowing the possibility of a deal after the court issues its ruling. (I have focused in the text on a deal in which the proponent agrees to produce the declarant. There could be other deals, however, in which the



Another reason to avoid indiscriminate use of OPPO-NENT'S OPTION is that, as with SPLIT BURDEN, if the court is incorrect in its belief that the proponent can produce the declarant, the ruling may unintentionally amount to an exclusion of the hearsay. If the opponent realizes that the proponent cannot produce the declarant, he would exercise the option; given the proponent's failure to produce the declarant, the hearsay would then be excluded. As with SPLIT BURDEN, the court might avoid this result by providing that, if the proponent made a good faith effort to satisfy his part of the burden, he should not be held accountable for his failure. Most often, though, the court would prefer not having to resolve this issue.

---

proponent agrees to do without any evidence from the declarant, or retains the option to do one or the other. I see no reason why such agreements ought not ordinarily be honored; in other words, there is no sound reason to adopt an inalienability rule.)

A liability rule would mean that the opponent might destroy the entitlement if he is willing to pay an objectively determined price for it; this is OP-  
PONENT'S OPTION. Removal of the entitlement would mean that the proponent must either produce the declarant or do without the benefit of any evidence from the declarant. Under OPPONENT'S OPTION, the opponent would actually have to pay the price only if the proponent chose the first alternative. One way to think of this is to say that if the proponent is unwilling to produce the declarant even though he does not have to pay the expenses of doing so, he ought to forfeit the initial entitlement. From another perspective, OPPONENT'S OPTION might be considered an order to the proponent, contingent on the opponent's making the demand, to produce the declarant in return for compensation, with the sanction for the proponent's failure to comply being the loss of the compensation for removal of the entitlement.

By a similar analysis, EXCLUDE and PROPONENT'S OPTION (imposition of the financial burden on the proponent and the physical burden on the opponent) might be considered alternative ways of protecting an initial entitlement allocated to the opponent. Whether the parties should be allowed to agree on admissibility of hearsay notwithstanding a ruling by the court tentatively excluding it is an interesting question. I believe they ordinarily should. Often, a similar result is accomplished without even presenting the issue to the court, by the parties' exercise of mutual restraint in objecting to each other's evidence.

The various forms of SPLIT BURDEN would represent a different, contingent allocation of the initial entitlement. The solution suggested for Hypothetical 9, for example, would represent an initial entitlement for Oppco unless Propco provided Oppco with the name and last known address of the declarant.

I have not used the terminology of Calabresi and Melamed in the text, in part because, although of broad applicability, it would probably seem awkward in the hearsay context. Moreover, there are substantial differences between the hearsay situation and the type of situation that is at the center of their concern; a glib attempt to apply their analysis here probably would be counterproductive. But this does not minimize the importance of their analysis in the conception and preparation of this Article.

Finally, OPPONENT'S OPTION will not effectively transfer to the opponent all the costs of producing the declarant, because not all those costs are financial. In Hypothetical 11, for example, Paul may find it distasteful to ask his sister to interrupt her travels. More significantly, in cases resembling Hypothetical 12, but in which prosecution of the declarant is a substantial prospect, nullifying the Fifth Amendment problem in the current case may pose real obstacles to the later prosecution. It probably would not make sense to try to require the accused in the first prosecution, as the price of procuring the declarant's testimony, to compensate the prosecutor for the impediment to the later case. The court will have to choose between imperfect alternatives.<sup>80</sup>

d. *Imposing on the Opponent All of the Financial Burden and Part of the Physical Burden*

In some instances, it might make sense to combine SPLIT BURDEN and OPPONENT'S OPTION. That is, a court might impose part of the physical burden on the proponent and the rest of the physical burden, and the entire financial burden, on the opponent.

Hypothetical 14: *Same facts as Hypothetical 13 (involving a memo the author of which can be identified only after a substantial inquiry), except that, as in Hypothetical 9, the memo was written five years ago, and the author presumably is no longer with Propco because three years ago Propco closed the office from which the memo was written.*

Here, only Propco can feasibly identify the declarant, and it, far more efficiently than Oppco, can locate her as of the time she left its employ. Accordingly, the court should impose the physical burden of performing those tasks on Propco.

On the other hand, given that the evidence is more probative than prejudicial, the court probably should impose all the other aspects of the burden of producing the declarant Oppco. The tasks assigned to Propco are expensive, and Oppco ought to

---

80. If the court chooses SPLIT BURDEN, imposing on the prosecutor the burden of nullifying the Fifth Amendment problem, the prosecutor will be put to a choice of forgoing the evidence or impeding the anticipated prosecution of the declarant. (Given that the hearsay is more probative than prejudicial, this ruling is at least preferable to EXCLUDE, which denies the prosecutor this choice and simply imposes the entire burden on her.) On the other hand, if the court chooses ADMIT, the hearsay will be admitted, but the accused will not have an opportunity to cross-examine the declarant. Which ruling to choose will depend on which of these problems seems greater in the particular case.

bear the cost of performing them, if they are to be performed. Furthermore, once Propco determines the name and last known address of the declarant, Oppco is in substantially as good a position to produce her as is Propco. Thus, Oppco should bear the cost of producing her and also the risk that she cannot be produced, which, if the declarant has left Propco, may be substantial.

This best method of allocating this burden would probably be as follows: The hearsay is admitted unless Oppco demands that Propco identify the declarant and determine her address as of the latest time she was in Propco's employ. If Oppco makes the demand, and Propco does not comply with it, the hearsay is excluded. If Propco does comply, then Oppco must compensate Propco for its effort, and the hearsay is admitted, at least unless Oppco produces the declarant. If Oppco does produce her, then Propco must present her testimony or forgo use of the hearsay.

This approach isolates the tasks as to which the proponent has a production advantage, and, at the same time, does not impose on the proponent any excess burdens. The proponent avoids the financial burden of those tasks as well as the risk that any of the other tasks required to produce the declarant cannot be performed. This ruling therefore is as close to ADMIT as possible, while still taking advantage of the proponent's advantages. On the other hand, this approach may entail substantial administrative costs. As with OPPONENT'S OPTION, the court may have to determine compensation for the proponent's work. And, as with SPLIT BURDEN, the court will sometimes have to determine whose failure caused the declarant not to be produced. And, as with both OPPONENT'S OPTION and SPLIT BURDEN, the court will sometimes have to ascertain whether the proponent's failure was in good faith.

e. *Excluding the Hearsay*

To this point, we have not considered the possibility that, because of the proponent's advantage in producing the declarant, the court should decide simply to EXCLUDE the hearsay, notwithstanding the fact that it is more probative than prejudicial. But, as discussed previously, if production would have been relatively easy for the proponent and relatively difficult for the opponent, that tends to suggest that the proponent decided to offer the hearsay in the first place because he feared

that the live testimony would be less advantageous to him.<sup>81</sup> Thus, the proponent's production advantage may be so great as to make EXCLUDE a tempting solution. Usually, though, a more parsimonious remedy would suffice. In some circumstances, the court may still find that ADMIT, accompanied by a "missing witness" argument by the opponent and a supporting instruction by the court, is an attractive ruling. Somewhat stronger medicine would be a ruling of OPPONENT'S OPTION, guaranteeing the opponent the ability to secure the declarant's production at the proponent's cost.<sup>82</sup> The remedy might be made stronger yet by requiring the proponent to commit before the opponent. That is, unless the proponent signifies a willingness to present the declarant's testimony, assuming the opponent demands production of the declarant, the hearsay is excluded.<sup>83</sup> If the proponent does express willingness, the op-

---

81. See *supra* pp. 741-42.

82. An argument against this remedy would be that, assuming the proponent has better access than the opponent to the declarant, the opponent may have no adequate way of assessing whether the probability that the proponent has withheld the declarant for manipulative reasons is great enough to make payment for production of the declarant worthwhile. (Conceivably, the opponent will hesitate to pay for producing the declarant because he assumes that, as in most cases, if cost and difficulty were not a factor, the proponent would have preferred live testimony to hearsay, whereas actually the proponent prefers the hearsay to live testimony because of information unknown to the opponent.) A partial response is the sequence of decisions suggested in the text, in which the court makes the proponent at least signal whether he prefers live testimony, assuming he has to pay for it, to no evidence at all from the declarant.

Beyond that, manipulation of this sort by the proponent is likely to hurt the opponent only if the hearsay is significant evidence, and manipulation is most likely to account for the proponent's decision to offer the hearsay rather than live testimony when it would be relatively easy for him to produce the declarant. In these circumstances, the opponent would have strong reason to suspect the proponent's motives and strong incentive to exercise the option, demanding production of the declarant. The option approach seems better, at least as a first resort, than a prophylactic rule excluding the hearsay. The prophylactic rule of exclusion would apply even though the hearsay appears to be net probative, and even though there is no reason, other than the disparity in ability to produce the declarant, for doubting the proponent's assertion that the desire to save costs accounts for his decision to offer the hearsay. The court might try a more finely-tuned rule, excluding the hearsay only if it has such great significance that production of the declarant at the proponent's cost clearly is worthwhile. The opponent, however, is better placed than the court to make the judgment, and if the hearsay is net probative, the opponent should bear the cost of production. (Occasionally, though, the proponent's failure to offer the live testimony might appear so suspicious that the failure contributes to making the hearsay appear net prejudicial; see *supra* pp. 741-42).

83. Thus, this sequence calls the proponent's bluff, at least in part, by making the proponent choose based on the hypothetical assumption that H is

ponent then must decide whether to demand production by the proponent. If he does not, the hearsay is admitted.

EXCLUDE does seem to be an appropriate ruling in those occasional cases in which the proponent's production advantage is absolute—that is, when the opponent has no means of producing the declarant but the proponent can do so without cost. At this limit, though, EXCLUDE merges with OPPONENT'S OPTION.<sup>84</sup>

*Hypothetical 15: Acker, the accused in a felony prosecution, does not wish to take the stand in his own defense. He does, however, offer proof of a hearsay statement that he has made. The prosecution objects.*

The prosecution (the opponent here) has no way to force Acker, the declarant, to testify. Acker, on the other hand, can easily take the stand in his own defense without any out-of-pocket costs. The court might therefore rule that it will exclude the hearsay unless Acker takes the stand and testifies to his memory of the underlying event or condition that was the subject of the statement. If Acker does testify, he must, at least to some extent, waive his privilege against self-incrimination. That prospect, however, does not appear especially troubling; it seems unacceptable to allow the accused to present his version of events through his hearsay statement and then prevent cross-examination by retreating behind the privilege.

## 2. When the Hearsay Is More Prejudicial Than Probative and the Opponent Possesses a Substantial Production Advantage

Subsection 1 dealt with the situation in which the balance of probative value versus prejudicial potential favored admission but the proponent's advantage in some aspect of producing the declarant favored exclusion. The reverse situation might also arise: The hearsay may be more prejudicial than probative, but the opponent might have an advantage in producing the declarant. This situation will not be analyzed at great length here, because in large part the analysis is a mirror image of

---

not an available possibility. If the proponent believes that, from his point of view, LT would be worse than NE, or not sufficiently better to warrant the costs of production, he will not commit himself to producing the declarant if the opponent exercises the DEMAND option. Note how this sequence differs from that suggested in connection with Hypothetical 13.

84. Because the proponent's out-of-pocket costs are zero, the opponent who prefers that the declarant testify live, rather than that the hearsay be admitted, would have no reason not to exercise the option. The proponent therefore must produce the declarant or forgo use of the hearsay.

that of the first situation.<sup>85</sup> As an example, consider the following hypothetical:

*Hypothetical 16: Paul wishes to introduce for a hearsay purpose a statement made by a friend of Otto's in a conversation with Paul and Otto. Paul, however, does not know the name or identity of the declarant. If Paul had known well enough before trial that he would want to present the statement, he could have, by means of either interrogatories or deposition questions, required Otto to provide the name and address of the friend. But the relevance of the statement became apparent only during trial, as a result of evidence introduced by Otto. The court regards the hearsay as more prejudicial than probative, though it would be inclined to admit live evidence by the friend.*

It might seem that, given that the hearsay evidence is more prejudicial than probative, the best result is simply to exclude the hearsay. But, given that live testimony by the declarant would be useful evidence and that the declarant cannot be produced without participation by the opponent, simple exclusion, imposing the full burden on the proponent, may be unwise. Imposing at least part of the burden on the opponent, by virtue of a sort of reverse best evidence rule, may induce production of beneficial evidence.<sup>86</sup> In this case, the best solution may be to adopt a form of SPLIT BURDEN. Because only Otto can provide the name and address of the declarant, the court ought to place the burden on him to do that. Because the hearsay is more prejudicial than probative, however, the court should place all the remaining aspects of the burden on Paul: If Otto suitably identifies the declarant, the hearsay is excluded unless Paul produces her.

#### D. THE IMPLICATIONS OF LATE NOTICE

Section B argued that, under certain assumptions, it is usually appropriate to admit hearsay. Section C examined the im-

---

85. In at least one sense, however, the situations may not be symmetrical: If a criminal prosecutor offers evidence of a hearsay statement made by the accused, and the court believes that the statement is more prejudicial than probative, the court probably should not (attempting to reflect the logic of the solution suggested for Hypothetical 15) admit the hearsay on the ground that the accused can take the stand if he wishes. Given that the statement is net prejudicial, it seems that such a ruling would put intolerable pressure on the accused's right not to testify.

86. The so-called best evidence rule, exemplified by Article X of the Federal Rules of Evidence, excludes certain evidence, although net probative, thus imposing a burden on the proponent and giving him an incentive to produce evidence that is more net probative. A reverse best evidence rule threatens to admit evidence that is net prejudicial, thereby imposing a burden on the opponent and giving him an incentive to play a role in producing evidence that is net probative.

fact of relaxing the assumption that the parties were substantially equally able to produce the declarant. This Section relaxes another of the assumptions, that the proponent has given sufficient notice of his intention to offer the hearsay. This is important because proponents sometimes give extremely late notice. Indeed, under current practice, often the first notice the proponent gives of his intention to introduce the hearsay is his attempt to do so.<sup>87</sup> In some cases, the lateness of notice means that the ability of the opponent, or of both parties, to produce the declarant is prejudiced, and this may alter the optimal hearsay ruling.

Most of the discussion below assumes that, if notice had been adequate, the court would have chosen ADMIT. At the end, I will add a few comments on the consequences of late notice when another ruling would be optimal given adequate notice.

Lateness of notice will not always have much significance. For late notice to prejudice the opponent in producing the declarant, it must be true both that producing her would have been relatively easy given fuller notice, and that producing her is relatively difficult given the later notice. Thus, if the declarant died before the litigation began, lateness of notice would not be prejudicial because, even given early notice, the opponent could not have produced the declarant. And at least ordinarily, the lateness of the notice in such a case should not alter the court's determination on the hearsay motion. At the other extreme, if the declarant is easily and instantly available even during trial, the lateness of notice should have little bearing on the hearsay issue.<sup>88</sup>

Now suppose, however, that it appears that late notice may have prejudiced the opponent's ability to produce the declarant. It could be, for example, that it takes a significant amount of time to identify and locate the declarant and to bring her to court. Or perhaps at an earlier stage the declarant was readily available, but in the interim she has died, disappeared, or traveled a substantial distance further away from the courthouse.

If the declarant can still be produced at trial, but not in time for presentation of her testimony during the proponent's case, usually the solution would be reasonably simple.

---

87. Thus, the sardonic trial lawyer's observation that the chief exception to the hearsay rule is the quick answer.

88. This is true at least if the court would not, given similarly late notice, bar the proponent from calling the declarant to testify live.

Hypothetical 17: *Without giving prior notice, Propco, on the last afternoon of presenting its case-in-chief, offers the hearsay statement of Dora Declarant. If Propco had given fuller notice, the court would have ruled ADMIT, because it regards the statement as more probative than prejudicial. It is concerned, however, that Oppco might not be able to produce Dora immediately, because she recently left on a short trip out of town. Oppco could, however, produce Dora before all the evidence is in, which is not expected to occur for three more days.*

In a case like this, the court might rule that, as under the usual ADMIT procedure—modified as suggested in Part III—it will admit the hearsay declaration unless Oppco timely produces Dora, in which case Propco will present Dora's live testimony (perhaps supplemented by the prior statement) or forgo use of the hearsay. If the notice had been sufficient, the court might have provided that production of Dora would be timely only if it allowed Propco to present her testimony in the sequence preferred by it as part of its case-in-chief. Because of the late notice, however, Oppco should not be required to produce the declarant during Propco's case-in-chief. Instead, the court might give Oppco until the end of Propco's rebuttal to produce her. If it does not produce her then, the hearsay will be admitted. If it does produce her by then, Propco will have to present her live testimony or forgo the hearsay. Presentation of the hearsay or of Dora's live testimony on rebuttal may not be the most effective order of evidence for Propco. It is reasonable, though, for Propco to absorb that loss so that Oppco will be able to examine the declarant on cross, rather than having to make the declarant its own witness. Unless Propco has a good excuse for the late notice (and arguably even then), it is also reasonable for Propco to absorb any incremental financial costs of the late notice.

The more difficult cases occur when, because of the late notice, the opponent is seriously prejudiced in, or altogether precluded from, producing the declarant at any time during the trial, even if the court extends the trial for a reasonable period. Assume first that the proponent has a good excuse for not giving earlier notice. I will not attempt here to define what constitutes a satisfactory excuse, but will only offer a few examples of what *might* be one. In some circumstances, through no lack of prior diligence, the proponent may learn of the hearsay only at a late date. Sometimes, surprising developments during trial—perhaps testimony elicited by the opponent in examining another witness—might lead the proponent to conclude that he needs to prove a proposition that he previously did not think he would have to prove. In some cases, the proponent may expect



to produce the declarant as a witness, but the declarant, through no fault of the proponent, becomes unavailable before testifying.

*Hypothetical 18: Without giving prior notice, Paul offers at trial a hearsay statement by Delores Declarant. Paul explains to the satisfaction of the court that the statement became material only the previous day, as the result of evidence introduced by Otto. Delores left the state on vacation last week, cannot be subpoenaed, and may not be back until well after the trial ends. If Paul had given fuller notice, the court would have admitted the statement, which it regards as more probative than prejudicial.*

Given that the proponent has a good excuse, the court should not necessarily accord the lateness of the notice in itself any significance. Of course, the ability of the respective parties to produce the declarant is, as always, an important consideration. But the fact that either party or both may *have been* able to produce the declarant if the proponent had known earlier that there was a potential hearsay dispute probably is immaterial. Thus, if neither party is able to produce the declarant, the court probably ought to treat the case just as it would if she were dead, or, for some other reason, the parties would both be unable to produce her even given ample notice. The court probably should not alter the decision to ADMIT, which by hypothesis it would have made given ample notice.

*Hypothetical 19: Same basic facts as Hypothetical 18, but also these in addition: Delores is Paul's sister, and he could presumably persuade her to return to testify if it was important for him.*

In this case, the proponent has a production advantage over the opponent. Thus, the best solution may be to adopt a ruling like OPPONENT'S OPTION. Under such a ruling, the opponent can, if he is willing to pay the cost, demand production by the proponent and thereby ensure, notwithstanding the lateness of notice, that either the declarant will testify or the hearsay will not be admitted. Arguably, if the opponent does demand production, the proponent should be required to absorb any incremental costs caused by the lateness of notice. Given the assumption that the proponent had a good excuse for the delay, however, it is probably best not to try such fine-tuning.

Now assume that the proponent does not have a good excuse for the failure to give earlier notice. At least ideally, the opponent should not be prejudiced by the proponent's delay; the proponent should absorb any loss. Thus, it might be tempting to conclude that the court should exclude the hearsay in this circumstance, because the proponent's unexcused delay has made production of the declarant by the opponent more diffi-

cult or impossible. The opponent will likely counter that, if the hearsay issue had been joined earlier and resolved against him, he surely would have produced the declarant, but now he is unable to, at least without incurring substantially increased expense.

Such assertions should be taken with a grain of salt. Often the opponent does not produce the declarant in response to a ruling admitting hearsay, even when he is perfectly able to do so. There is no reason to give the opponent a windfall by accepting as certain his retrospective representations that he would have produced the declarant if he had earlier notice. There is no reason to exclude the hearsay, simply because the proponent's delay in giving notice prejudiced the opponent's ability to produce the declarant, if the delay caused no genuine prejudice because the opponent would not have produced the declarant even given ample notice.

If the court is confident on this score, therefore, the lateness of the notice probably should not dissuade it from admitting the hearsay. Determining what the opponent would have done, given ample notice, does, of course, involve retrospective second-guessing. The court should ask the opponent to show not only that production is difficult or impossible now, and also that it would have been easy if the proponent had given enough notice. The court should also ask the opponent to show that he would have had strong enough reason to produce the declarant—for example, enough hope that cross-examination would be productive. In some cases, the court can make a reasonably confident determination of what the opponent would have done.<sup>89</sup>

Sometimes, though, the court will be unable to conclude with sufficient confidence that the opponent would not have produced the declarant if notice had been sufficient. Even then, the court should hesitate before simply excluding the hearsay. Some form of burden splitting frequently offers a better alternative, though in the end it may result in exclusion of the hearsay. The basic principles behind such a ruling would be as follows: The opponent ought to bear the financial burden, to the extent that he would have had to do so if the proponent had given ample notice; the proponent ought to bear any incre-

---

89. Recall that it is sometimes difficult for the court to predict whether the opponent will find production of the declarant sufficiently important to warrant the costs. *See supra* pp. 748-50. It seems possible that ordinarily the assessment would be no easier to make retrospectively.

mental financial burden caused by the lateness of notice; and because the proponent's delay in giving notice has prejudiced the opponent's ability to produce the declarant, the proponent ought to bear the physical burden of producing her, at least the incremental burden caused by the delay and at least to the extent the opponent is not able to produce her much more efficiently.

Hypothetical 20: *Without giving prior notice, and without sufficient excuse for not giving notice, Propco offers, during its case-in-chief, the hearsay statement of Dolly Declarant, an employee of Oppco. Dolly lives in distant Remoteville, and special arrangements would have to be made to bring her to Courthouse City before the close of testimony. Arranging a deposition—which in any event would not be as satisfactory as live testimony—in Remoteville at this point would not be feasible. The court is persuaded that the statement is more probative than prejudicial, and therefore would have admitted it if Propco had given adequate notice. The court also believes, however, that given adequate notice, Oppco might have produced Dolly.*

The following fictitious transcript presents a scenario of how this issue might be resolved:

THE COURT: I don't want Oppco prejudiced at all by Propco's delay. So this is how I'll rule.

I'm going to admit the hearsay now, Ms. Oppenheimer (Oppco's counsel), unless you tell me that you're willing to pay an amount equal to the commercial airfare toward the cost of bringing in the declarant. You would have had to pay that even if you had plenty of notice, assuming you really would have brought her in. Do you want to do that?

MS. OPPENHEIMER: Yes, we do, Your Honor. We really don't want to let her hearsay statement come in without a chance to cross-examine her, because we think her testimony will be a lot clearer than the statement.

THE COURT: Maybe so. I'm doubtful, but that's your choice. Given that, Ms. Pratt [Propco's counsel], now the choice is yours. You can forget about the evidence, or you can try to bring the declarant here.

MS. PRATT: Well, Your Honor, we really need her statement or her testimony. I think we can get her here tomorrow on the company plane.

I've got one problem, though. Given that Dolly is an employee of the defendant, I'm not sure that she'll come in at our behest, and I'm not even sure I can ethically speak with her to make arrangements. And a subpoena won't run that far. Therefore, will you ask Ms. Oppenheimer to tell Dolly to cooperate with us?

THE COURT: That sounds reasonable enough, Ms. Oppenheimer. It doesn't strike me that you're prejudiced by having to do that. Any objection?

MS. OPPENHEIMER: No, Your Honor.

THE COURT: OK, so ordered. I'll assume there won't be any trouble with that. Now, Ms. Pratt, understand that this case should be ready for summations by tomorrow afternoon, and I'm not going to keep the

jury another day just waiting for Dolly. So if you don't get her here by then, you're out of luck. If you get her here before all the other evidence is in, I'll let you put her on during your rebuttal, and then you can send Ms. Oppenheimer a bill for the commercial airfare. I assume you'll be grown-ups, and I won't have to arbitrate what fare Ms. Oppenheimer would have had to pay if you had given adequate notice.

And by the way, counselor, you could have saved yourself a lot of gasoline and a lot of mileage on the company plane if you had given a few days' more notice.

MS. PRATT: Understood, Your Honor.

Note that if the declarant has become absolutely unavailable, or for some other reason the opponent is confident that the proponent would be unable or unwilling to pay the extra costs of production, a procedure like this would amount to exclusion of the hearsay: Knowing that the declarant could not be produced, the opponent would have no disincentive to express willingness to pay what it would have cost to produce her if notice had been ample, and this costless bravado would result in excluding the hearsay. This may give the opponent a windfall, for he may not have been prepared to produce the declarant if notice had been ample and the court ruled in favor of admitting the hearsay.

Such a windfall would only arise, however, in a limited conjunction of circumstances. It must be that the proponent gave unexcused late notice; the court cannot say with sufficient confidence that the opponent would have been either unwilling or unable to produce the declarant if notice had been ample; in fact, the opponent would not have produced the declarant if notice had been ample; *and* the opponent has confidence that the declarant cannot feasibly be produced.

In all other circumstances, this procedure would—assuming that the court could administer it reasonably smoothly and accurately—avoid giving a windfall to the opponent, but without prejudicing him on account of the proponent's delay in giving notice. The administrative costs cannot be ignored; determinations of actual costs of production, hypothetical costs assuming timely notice, and good faith can be very tricky. The benefits of the procedure are substantial, however, and so often, probably most often, it will be worth the costs to adopt this procedure rather than simply exclude the evidence because of lateness of notice.

So far, this discussion has assumed that the court's optimal ruling, if notice had been adequate, would have been ADMIT. The essence of the analysis is that, in some circumstances, the delay in notice should cause the court to impose the physical

burden of production, and any incremental costs, on the proponent.<sup>90</sup> The same approach might be applied if the optimal ruling, given adequate notice, would have been something other than ADMIT. For example, suppose that ruling would have been OPPONENT'S OPTION, meaning that the court would impose the physical burden of production on the proponent anyway. Given delayed notice, the court probably should make the same ruling, except that the proponent should also be responsible for any incremental costs caused by the delay. And if the best ruling given adequate notice would have been EXCLUDE, the proponent's delay in giving notice can only fortify the support for that ruling.

From this analysis, it should be apparent that the court has a better chance of reaching optimal results at low administrative cost if the proponent gives ample notice of his intention to offer a hearsay statement. If the court imposes on the proponent the risks and losses caused by his unexcused delay, that probably creates enough incentive for the proponent to give sufficient notice. Such an approach avoids overly penalizing the proponent. Trials are often complex and prepared under great time pressure. A flat requirement that the parties identify and give advance notice of all the individual hearsay statements that they intend to produce would entail administrative costs and probably put excessive demands on the organizational abilities and foresight of most lawyers. Also, failure to give notice would create a ground of objection in many cases where otherwise a successful objection would be unlikely.

Courts might, however, reasonably create some extra inducement to parties to give early notice. Many courts require parties in advance of trial to provide lists of witnesses that they intend to call.<sup>91</sup> It may be appropriate to advise them at the

---

90. The same principles, in reverse, might apply when the proponent has given advance notice but the *opponent* has been dilatory in objecting to the evidence. That is, if, given a timely objection, the court would have put the burden of producing the declarant on the proponent, the delay of the objection might induce the court to shift the physical burden and the incremental financial burden to the opponent.

91. Under proposed Federal Rule of Civil Procedure 26(a)(1)(A), each party would have to provide every other party, shortly after the commencement of the action, with "the name and, if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense." See 112 S. Ct. at cxxvi-cxxvii. Under proposed Rule 26(a)(3), each party must, at least thirty days before trial unless otherwise directed, provide the other parties with the names of each witness "whom the party expects to present and those whom the party may call if the need arises," the names of witnesses whose testimony the party expects to present

same time to identify all the hearsay statements that they expect to offer. That is, the court may prescribe a time and method for the parties to give pretrial notice of intent to offer hearsay (without prejudice to earlier notice where the proponent thinks that might be helpful). Failure to list a given statement would not necessarily preclude admission of the statement at trial. The judge might make it clear, however, that if a statement were not listed, she would be reluctant to conclude that the proponent had a sufficient excuse for giving late notice. The proponent therefore would likely suffer adverse consequences, at least in allocation of the burden of producing the declarant, and perhaps in the ultimate evidentiary result as well.<sup>92</sup>

---

by deposition, and an identification of each exhibit that the party anticipates offering. *Id.* at cxxix.

92. Note that, unlike other arguments sometimes made for notice of intent to offer hearsay, e.g., Park, *supra* note 28, at 119; Weinstein, *supra* note 5, at 340-41, the argument offered here is not based to a substantial degree on the desirability of preventing surprise; rather, it is based on the desirability of facilitating the opponent's effort to produce the declarant, if he should decide to do so. It is not usually a reason for excluding testimony of a witness that the opponent is surprised by the testimony; nor should it be, particularly when liberal discovery gives the opponent satisfactory means of minimizing the chance that he will be surprised by hearing testimony for the first time at trial. Opponents probably are no more likely, or perhaps even less likely, to be surprised by hearsay than by other forms of the witness's testimony; sometimes, in fact, the opponent might have been present when the hearsay declaration was made.

Furthermore, when the opponent is surprised, the prejudice is usually no greater with respect to hearsay than with respect to other testimony—except to the extent that the surprise hinders the opponent from producing the declarant. An opponent's cross-examination of a witness who testifies to the underlying events is likely to be impaired substantially if the opponent is surprised by the testimony, and later efforts might be transparent attempts to repair the damage. When the witness's testimony is of a hearsay statement, the opponent may face the same difficulty, to the extent he wishes to challenge the credibility of the witness on the stand. To the extent the opponent wishes to challenge the statement allegedly made by the declarant, though, there is a limited amount that the opponent can do with the witness on the stand, no matter how much advance notice he has; the challenge to the declarant's credibility must come later, so that even if the opponent is surprised, he has some time to put his response together without it being manifestly a reaction to surprising evidence. In order for surprise to prejudice the opponent significantly in challenging the declarant, there would have to be some effective response, perhaps a demonstration of some non-obvious bias on the part of the declarant, that the opponent would have been able to mount had he been given fuller notice, but is unable to mount before the end of the trial given the short notice. I do not believe this problem arises often (though, of course, it is impossible to be sure). It is probably better for the court to respond individu-

## VI. CONCLUSION

I will offer a summary of sorts by pointing to several respects in which the approach suggested here differs from—and, I believe, is superior to—current hearsay doctrine.

(1) Under the received wisdom guiding current doctrine, the key considerations in determining whether to admit hearsay are circumstantial probability of trustworthiness and the necessity for the evidence.<sup>93</sup> These standards do not work.

Trustworthiness cannot be a good guide, because even the model evidence, in-court testimony subject to cross-examination, need not be at all trustworthy. Although sometimes one party will not present evidence at all, the classic trial is all about the presentation of conflicting evidence. Logically, some of that evidence must not be trustworthy.

The better question, as suggested in this Article, is whether the fact that the evidence is hearsay, and so is subject to possible jury overvaluation, makes it more prejudicial than probative—that is, a net hindrance to the truth-determining process. Assessing trustworthiness is, at best, a very rough proxy for assessing the danger of jury overvaluation. If the judge deems the evidence trustworthy, she may be confident that whatever probative value the jury assigns it will not be substantially excessive. Thus, trustworthiness does state a *sufficient* condition for satisfying the probative-versus-prejudicial balance. But trustworthiness is not a *necessary* condition for satisfying that balance. Suppose an item of evidence is highly probative, in that it alters the probability of a material proposition, and not particularly prejudicial, because the jury is able to assess it reasonably well. Nevertheless this evidence is not necessarily trustworthy, because even given the evidence, the material proposition may be subject to reasonable dispute. Determining the disputed factual issues of the case is the jury's job. The court should not, in effect, require that, before allowing the jury to hear evidence, the court itself must be persuaded of the truth of the proposition the evidence is offered to prove. If the jury has some ability to recognize hearsay dangers, and to discount the statement accordingly, the statement is probably more probative than prejudicial, even if the judge does not have complete confidence in the statement's accuracy.

---

ally to cases where this danger appears to be significant than to create a broad and rigid notice requirement.

93. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 1420-1423 (James H. Chadbourne rev. ed. 1974).

As to necessity, if in fact the evidence is more probative than prejudicial, that is sufficient demonstration that the evidence is necessary: If the case is in dispute, there is a need for any evidence that will advance the truth-determining process. The more appropriate question is whether a better grade of evidence, live testimony, would be sufficiently more valuable to warrant its production, assuming production is feasible. The analysis presented here suggests that generally the court should not attempt to answer that question directly. Rather, the court should allocate the burden of producing the declarant in a way best suited to lead to a fair and efficient result, taking into account the impact of the hearsay on the truth-determining process and the respective abilities of the parties to produce the declarant.

(2) Under current doctrine, hearsay is presumptively excluded, and admitted only if it is deemed to fit one of a long list of exceptions. I believe that under the approach presented here, the presumption would be reversed because most often the fact that a statement is hearsay does not mean that it has more prejudicial potential than probative value. As with other types of evidence having significant probative value, the opponent has the burden of showing why it should be excluded. Also, as with other evidence, the opponent ordinarily is left with the burden of presenting evidence that he thinks might rebut the evidence offered by the proponent. This makes admission of the hearsay—as well as a responsive decision by the opponent to secure the production of declarant—far more likely.

(3) Under current doctrine, if the opponent of hearsay produces the declarant, he must examine her under unfavorable circumstances. The approach suggested here would eliminate that disadvantage. And this often makes it far more palatable to impose on the opponent the burden of producing the declarant.

(4) With some important exceptions, current doctrine pays little attention to the ability of the opponent to produce the declarant.<sup>94</sup> Indeed, current doctrine pays only limited attention

---

94. One exception is the doctrine exempting party admissions from the hearsay ban. FED. R. EVID. 801(d)(2). The doctrine is often, though not always accurately, defended on the basis that the party to whom the statement is attributable, directly or vicariously, and against whom the statement is offered, can put the maker on the stand. Also, the residual exceptions under the Federal Rules of Evidence, Rules 803(24) and 804(b)(5), provide that the proponent cannot invoke them unless he gives advance notice, including the name



even to the ability of the proponent to produce the declarant. Notwithstanding the supposed significance of the necessity for the evidence, availability is a factor only with respect to a few of the hearsay exceptions. When current doctrine does make the availability of the declarant a significant factor, availability is generally treated as a binary factor—the declarant is either available or unavailable. The approach presented here makes the ability of each of the parties to produce the declarant a potentially significant factor in determining the court's precise ruling. And it recognizes that, except in the case of death and some other extreme cases, availability is a matter of degree—of how much money and effort it would take to produce the declarant.

(5) Current doctrine has nothing resembling the procedures proposed here in which the burden of producing the declarant is split between the parties. These burden-splitting procedures make it possible, for example, for the court to take advantage of the proponent's superior ability to perform part of the set of tasks necessary to produce the declarant and yet to impose on the opponent remaining aspects of the burden. Thus, only rarely is the best solution a ruling simply excluding the hearsay and thereby imposing on the proponent the entire burden, both physical and financial.

(6) Under current doctrine, a statement otherwise characterized as hearsay is, with exceptions, no less hearsay because the declarant is on the witness stand. Under the approach suggested here, the rule concerning prior statements by a witness is a preferential one: Ordinarily, the witness should first testify from current memory, and then, if the proponent still wants to introduce the hearsay statement, the court should assess whether the statement has sufficient incremental probative value to warrant admission.

(7) For the most part, current doctrine does not make prior notice of intention to offer hearsay significant.<sup>95</sup> The approach presented here recognizes that optimal decisions are more likely if the proponent gives ample notice, and holds him

---

and address of the declarant. This requirement, which some courts have declined to follow, *see* Park, *supra* note 28, at 101 n.206, apparently was meant to facilitate the opponent's attempt to produce the declarant.

95. As mentioned above, on the face of the residual exceptions, Rules 803(24) and 804(b)(5), prior notice appears to be essential for application of the exceptions, but these rules have not always been applied strictly. *See supra* note 94.

accountable for his failure to do so. It does not, however, create a flat rule requiring prior notice.

(8) Current doctrine relies heavily on a categorical approach, making most decisions dependent on whether or not the given hearsay statement fits within one of the many enumerated exemptions from the rule against hearsay. This often requires a good deal of "book learning" for a judge to make the decision prescribed by the doctrine. Not surprisingly, judges, like students, often find hearsay doctrine baffling. No matter how predictable hearsay law may be in theory, judicial error therefore makes it less so in practice. The approach suggested here, by contrast, focuses on the practical considerations surrounding the particular statement at issue—its probative value and prejudicial impact, and the difficulties that the parties would have in producing the declarant. Courts considering these factors would not always come to the same results, of course. But their rulings would be reasonably predictable, and usually sensible, because their attention would be focused on the questions that they should ask in ruling on a hearsay objection.

The court might ask both the proponent and opponent several questions: What probative value do you believe the hearsay has, and what do you believe is its prejudicial potential?<sup>96</sup> Is there any task necessary to producing the declarant that your adversary could perform but that you could not, or that he could perform substantially more efficiently than you could? If so, how great is the disparity?

If the proponent is late in giving notice of his intention to introduce the hearsay, the court might also ask both parties: Could you produce the declarant? If not, why not? If so, how quickly? Of the proponent, the court might also ask: Why did you not give notice earlier? And of the opponent, the court

---

96. Subsidiary questions that the court might ask in attempting to assess the probative-prejudicial balance include the following:

Of the proponent: Are there particular circumstances assisting the jury in evaluating the reliability of the hearsay statement even in the absence of the declarant? Can you represent that you have no reason to believe that, if the declarant were to testify live, she would depart materially from the hearsay statement? Is there any affirmative reason to believe that, if she were to testify, she would adhere to the hearsay statement?

Of the opponent: Are there particular circumstances suggesting that the jury will not discount the hearsay sufficiently to take into account the absence of the declarant? Do you have any affirmative reason to believe that if the declarant were to testify live she would depart in a material way from her hearsay statement?

might ask: Is there any reason to believe you would have had an easier time producing the declarant if you had been given earlier notice? If so, how expensive do you think it would have been to produce the declarant then, and how would you expect live testimony by the declarant to be more favorable to your case than admission of the hearsay?

If the analysis presented in this Article is correct, but the court does *not* base its rulings on the answers to questions such as these, one might wonder how close to the mark those rulings can be. If the court asks such questions, a sound course of decision usually will become apparent; if not, it may be because it would be reasonable either to admit the evidence or select some form of burden-splitting. Rather seldom would the best choice be simply to exclude the evidence.

One side benefit to the court of the approach presented here may be that opponents would be less likely to make hearsay objections if the court's likely response would be something like the following:

OK, counselor, I'll call your bluff. If it's so important to you to be able to examine the declarant, why don't you bring her in? I'm sure that if you do, your adversary will be delighted to present her live testimony, and then you'll have a chance to cross-examine.